Petition

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81-1463

No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

KELVIN HASTING , ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED *

Whether the court of appeals correctly refused to apply the harmless error doctrine when it concluded that the prosecutor had commented on respondents' failure to testify.

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* The following persons are respondents in this case: Kelvin Hastings; Gable Gibson; Napoleon Stewart; Gregory Lamont Williams; and Kevin Wendell Anderson.

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

KELVIN HASTINGS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-5a) is reported at 660 F.2d 301.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 6a-7a) was entered on September 22, 1981. A petition for rehearing was denied on November 20, 1981 (App. C, *infra*, 8a). On January 11, 1982, Justice Stevens extended the time to petition for a writ of certiorari to and including February 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, respondents were convicted of kidnaping, in violation of 18 U.S.C. 1201, interstate transportation of a female for immoral purposes, in violation of 18 U.S.C. 2421, and conspiracy, in violation of 18 U.S.C. 371. Respondents Hastings, Stewart and Williams were sentenced to concurrent terms of 50 years' imprisonment on the kidnaping count and five years' imprisonment on the interstate transportation and conspiracy counts. Respondents Gibson and Anderson were sentenced to concurrent terms of 40 years' imprisonment on the kidnaping count and five years' imprisonment on the interstate transportation and conspiracy counts (Tr. 1000-1001, 1012). The court of appeals reversed the convictions (App. A, *infra*, 1a-5a).

1. The evidence at trial showed that during the early morning of October 11, 1979, three teenage girls, Marianne Long, Carma Starnes, and Tammy Warren, were riding in an automobile in the vicinity of East St. Louis, Illinois, with Randy Newcomb. A turquoise Cadillac occupied by respondents bumped the girls' vehicle, forcing it to pull off the highway and stop. Brandishing what appeared to be a handgun, respondent Williams approached the vehicle and directed its occupants to "open the door or else I'm going to shoot" (Tr. 113-115, 283-298, 412-414). Respondent Stewart, who had joined Williams, reached into the car and unlocked the door. Williams and respondent Anderson then pulled Starnes out by the hair, and Anderson choked her (Tr. 115-117, 295-298, 515). Stewart went to the other side of the car and threatened to kill Long if she did not unlock her door. After Williams, who had entered the vehicle to re-

move money from the girls' purses, unlatched the door, Stewart dragged Long out (Tr. 118). Next Williams picked up a brick and told Warren that if she would not open her door he would smash the window. When she complied, he pulled her from the vehicle and repeatedly struck her in the face with the brick (Tr. 120, 301, 416).

After the girls had been removed from their automobile, Long was placed upon its top, where Stewart and respondent Gibson raped her and forced her to perform acts of sodomy (Tr. 119, 120, 416). Respondents then forced all the girls into the Cadillac, and Stewart drove to St. Louis, Missouri (Tr. 123-124, 305-306).[1] En route, Stewart forced Long to commit acts of sodomy, while Williams raped her. While Hastings held a weapon to Starnes' side, Anderson forced her to sodomize him (Tr. 124-125, 310). When Warren refused the orders of respondents Hastings and Gibson to sodomize them, they repeatedly struck her (Tr. 419).

In St. Louis, the girls were taken to a vacant garage and dragged from the Cadillac (Tr. 129, 313). There Stewart raped Long again, Hastings and Gibson raped Warren and forced her to sodomize them, and Anderson raped Starnes after Williams choked her (Tr. 128-129, 312-313, 418-419).[2]

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[1] Respondents ordered Newcomb to remove his clothing and go behind a nearby building. After respondents left, he returned, flagged down a passing motorist, and summoned the police (Tr. 514-517).

[2] The owner of the garage, who entered the darkened premises during these events, observed four black men and two women, at least one of whom was white. One of the men was holding one of the women while another man raped her (Tr. 586-587). One of the men matched Anderson's descrip-

After the girls were detained at the garage for approximately 25 minutes, Williams and Stewart forced Long and Starnes back into the Cadillac and took them to Stewart's apartment, where they took turns raping and sodomizing them (Tr. 133-138, 319-323).[3] Hastings, Gibson, and Anderson forced Warren into a different vehicle and took her to another garage, where they again raped her and compelled her to perform acts of sodomy (Tr. 421-423). After Anderson and Gibson left, Warren begged Hastings to release her. He responded "[n]ot yet," and continued his sexual assaults (Tr. 423).

Following the assaults, Stewart, Williams and Hastings released the girls, who notified the police. Using a description of the scene of the rapes that the girls furnished, the police located Stewart's apartment, arrested him, and found items of the girls' clothing and personal papers belonging to Long (Tr. 138-142, 324-327, 631-638). They also located the turquoise Cadillac in which the girls had been abducted, determined that it was registered to Williams, and found Williams' fingerprints on the girls' car. Following the arrest of the other respondents, the girls identified each of them during police lineups (App. A, *infra*, 2a; Tr. 662, 672-673, 684).

2. A defense witness testified (Tr. 752-756) that the occupants of the two cars conversed in a service station at about 2:30 that morning; another witness

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tion. When the garage owner asked what was going on, Stewart responded "[w]e're just taking care of business" (Tr. 132, 315). The garage owner told respondents to leave, but did not notify the police (Tr. 593-594, 597).

[3] Stewart's mother testified that her son and Williams arrived at the house about 5:30 in the morning with two white girls, and stayed about half an hour (Tr. 608-612).

suggested that Newcomb had been reluctant to report the incident (Tr. 731-733, 746) and that one of the girls had been too drunk to drive (Tr. 743).[4] The primary defense theory, however, was to suggest the possibility of mistaken identity by presenting evidence that some of respondents' hair styles immediately before and after the incident differed from the victims' descriptions of their assailants' appearance.[5]

3. During his summation, the prosecutor discussed the government's evidence. He then turned to the defendants' case, and stated (App. A, *infra*, 3a n.*; Tr. 873-874):

> MR. HURSEY [prosecutor]: * * * Let's look at the evidence the defendants put on here for you so that we can put that in perspective. I'm going to tell you what the defendants did not do. Defendants on cross-examination and—
>
> MR. BOOTH [defense counsel]: I'll object to that, Your Honor. You're going to instruct to the contrary on that and the defendants don't have to put on any evidence.
>
> MR. HURSEY: That's correct, Your Honor.
>
> THE COURT: That's right, they don't. They don't have to.
>
> MR. HURSEY: But if they do put on a case, the Government can comment on it. The defend-

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[4] Respondents' cross-examination of the prosecuting witnesses focused on their actions on the evening of October 10-11 before their car was stopped, and on their subsequent identifications of respondents (Tr. 169-263, 335-380, 429-502, 524, 560).

[5] For example, while the victims testified that Williams was wearing a goatee, his mother testified that his facial hair on October 11, 1979, consisted only of a moustache. Similarly, while the victims testified that Anderson was wearing his hair in an Afro, friends and relatives testified that on the evening before and the morning after the incident he was wearing it in "french braids" (Tr. 749, 789, 795, 798, 805).

> ants at no time ever challenged any of the rapes, whether or not that occurred, any of the sodomies. They didn't challenge the kidnapping, the fact that the girls were in East St. Louis and they were taken across to St. Louis. They never challenged the transportation of the victims from East St. Louis, Illinois to St. Louis, Missouri, and they never challenged the location or whereabouts of the defendants at all the relevant times. They want you to focus your attention on all of the events that were before all of the crucial events of that evening. They want to pull your focus away from the beginning of the incident in East St. Louis after they were bumped, and then the proceeding events. They want you to focus to the events prior to that.

Following this argument, respondents moved for a mistrial. The motion was denied (Tr. 875, 973).

4. On appeal, the court of appeals reversed respondents' convictions. It relied upon this Court's decision in *Griffin* v. *California*, 380 U.S. 609 (1965), and its own prior decision in *United States* v. *Buege*, 578 F.2d 187, 188, cert. denied, 439 U.S. 871 (1978) (citations omitted), in which it had stated:

> Direct reference by a prosecutor to a defendant's election not to testify at trial is clearly proscribed. Indirect comments such as * * * references * * * to "uncontradicted testimony" constitute error when the statements are "manifestly intended to be or [are] of such a character that the jury [will] naturally and necessarily take [them] to be comment on the defendant's failure to testify." This court has previously held that when a prosecutor refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony, such reference neces-

> sarily focuses the jury's attention on the defendant's failure to testify and constitutes error.

Applying this reasoning to the facts of this case, the court asserted that only respondents could have disputed the testimony of the victims implicating them in the sexual assaults, and concluded: "It is difficult to imagine a more pointed allusion to the failure of the defendants to take the witness stand other than a direct reference to such failure. Equivocal interpretation is not possible." App. A, *infra*, 4a).

The court reversed the convictions because of the prosecutor's remarks. It declined to assess whether, in view of the weight of the evidence, there was any reasonable possibility that the argument might have contributed to the conviction. Noting that " '[t]he remarks, harmless or not, * * * should not occur' " because of their infringement upon fundamental constitutional protections, it held that "[d]espite the magnitude of the crimes committed and the clear evidence of guilt, an application of the doctrine of harmless error would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights" (App. A, *infra*, 5a). The government's petition for rehearing, calling the court's attention to the apparent inconsistency between its holding and the holding of this Court in *Chapman* v. *California*, 386 U.S. 18 (1967), was denied without comment (App. C, *infra*, 8a).

REASONS FOR GRANTING THE PETITION

In *Chapman* v. *California*, 386 U.S. 18 (1967), the Court considered the contention that the precise kind of constitutional error found to have occurred in the instant case—improper comment upon the defendants' failure to take the stand at trial—required automatic reversal of the conviction without regard to whether

the error prejudiced substantial rights of the defendants at the trial. The Court squarely rejected that contention in *Chapman* (*id.* at 21-22), and it has subsequently been steadfast in its refusal to reverse either state or federal convictions for harmless constitutional errors. *E.g.*, *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (*Bruton* violation); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (use of confession in violation of Sixth Amendment right to counsel); *Harrington* v. *California*, 395 U.S. 250 (1969) (use of co-defendants' confessions in violation of confrontation rights). These holdings, which the court of appeals disregarded in this case, not only reflect sound judicial policy, but in addition comply with statutory requirements imposed upon both this Court and the federal courts of appeals. 28 U.S.C. 2111; Fed. R. Crim. P. 52(a).

In ignoring the plain command of Congress and the decisions of this Court, the court of appeals has compelled the government and the victims of this heinous crime to undergo another lengthy trial,[6] despite the convincing evidence of guilt and the lack of any substantial possibility that the prosecutor's arguably improper remarks had any effect on the jury's verdict. In these circumstances, we submit that review by this Court is in order and that summary reversal may be appropriate.

1. In *Chapman* v. *California*, *supra*, both the court's instructions to the jury and the prosecutor's closing argument, relying on a provision of the Cali-

[6] The jury heard four days of testimony (App. A, *infra*, 3a). The psychological burden placed upon the victims, in requiring them to again give public account of the harrowing details of the repeated sexual assaults they suffered, needs no elaboration here.

fornia Constitution that permitted comment upon a defendant's failure to testify, repeatedly alluded to the defendants' silence and their failure to testify concerning events within their knowledge. 386 U.S. at 19, 25, 26-42. Shortly after the trial, this Court held in *Griffin* v. *California*, 380 U.S. 609 (1965), that the state constitutional provision was an impermissible infringement upon the Fifth Amendment privilege against compelled self-incrimination. After granting review in *Chapman*, this Court considered the contention that constitutional errors in general—and *Griffin* violations in particular—should always require reversal without regard to prejudice. While the Court acknowledged that some kinds of constitutional errors might not be subject to a harmless error analysis, and while it regarded the repeated references to the defendants' failure to testify prejudicial in the particular circumstances of the *Chapman* case, it expressly declined to adopt a rule that would require automatic reversal for this kind of constitutional violation (386 U.S. at 21-22). Instead, relying on the standard articulated in *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), the Court held that, where a court is able to determine beyond a reasonable doubt that the improper argument did not contribute to the verdict, reversal is inappropriate (386 U.S. at 24).[7]

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[7] Applying this standard to the facts of *Chapman*, the Court concluded that the prosecutor's repeated and direct references to the defendants' silence virtually caused them to become witnesses against themselves; moreover, the evidence was sufficiently inconclusive that, absent the remarks, the jury might have refused to convict. Accordingly, reversal of the convictions was required (386 U.S. at 26).

This Court also considered the appropriateness of reversal under the harmless error rule in *Anderson* v. *Nelson*, 390 U.S.

2. Relying upon this Court's holding in *Chapman*, the courts of appeals had heretofore consistently held that the constitutional harmless error doctrine is applicable to references by the prosecutor during closing argument to a defendant's failure to testify. See, *e.g.*, *United States* v. *Parker*, 549 F.2d 1217, 1221 (9th Cir.), cert. denied, 430 U.S. 971 (1977); *United States* v. *Sanders*, 547 F.2d 1037, 1042 (8th Cir. 1976), cert. denied, 431 U.S. 956 (1977); *Berryman* v. *Colbert*, 538 F.2d 1247, 1251 (6th Cir. 1976); *United States* v. *White*, 444 F.2d 1274, 1278 (5th Cir.), cert. denied, 404 U.S. 949 (1971); *Coleman* v. *United States*, 420 F.2d 616, 625 (D.C. Cir. 1969); *United States ex rel. Satz* v. *Mancusi*, 414 F.2d 90, 92 (2d Cir. 1969).[8] The instant decision—flatly declaring

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523, 524 (1968), and found that, in view of the extensive nature of the prosecutor's improper comments and the presence of evidence that could have supported an acquittal, remarks inviting the jury's attention to the defendant's failure to testify were not harmless beyond a reasonable doubt.

[8] In *United States* v. *Flannery*, 451 F.2d 880, 882 (1st Cir. 1971), the court, invoking its supervisory power, stated that in cases tried after the date of the opinion it would reverse without a finding of prejudice whenever the prosecutor has argued that evidence is uncontradicted and "it is apparent on the record" that there was no one other than the defendant who could have contradicted that evidence, unless the district court has immediately instructed the jury about the defendant's right not to testify and stated that the prosecutor was guilty of misconduct. The court in *Flannery* itself found that the remarks were prejudicial (*ibid.*), and the First Circuit has never reversed a conviction in the absence of a finding of prejudice.

The court of appeals did not purport to rest its decision in the instant case upon an exercise of its supervisory powers. To the contrary, its discussion focuses solely upon the perceived need to protect the constitutional right it believed to have been infringed. App. A, *infra*, 5a. Moreover, for several

the harmless error principle inapplicable in cases like this one—is thus in conflict with the uniform circuit court precedent on this issue.[9]

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reasons, we doubt the court could adopt an automatic reversal rule for improper comment upon a defendant's failure to testify. First and foremost, such a rule would conflict with the mandate of 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a), which require that harmless errors be disregarded. It is settled that the supervisory power of the courts may be exercised only in the absence of legislation on the subject. See, *e.g.*, *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959); *Wolfle* v. *United States*, 291 U.S. 7, 13 (1934); *Funk* v. *United States*, 290 U.S. 371, 382 (1933). Apart from this, the kind of error involved here is often far from obvious, so that prohibited indirect comment on a defendant's failure to testify is usually likely to reflect an unwitting crossing of a quite indistinct line rather than deliberate or knowing prosecutorial overreaching. Indeed, in this very case the district court perceived no error in the prosecutor's argument of the kind found by the court of appeals (Tr. 973). This makes it difficult to justify a blanket rule of the kind adopted by the court of appeals as a rational and measured application of supervisory power. And even were the court able to conclude in a particular case that improper comment constituted knowing misconduct or was part of a pattern of repeated violations by a particular prosecutor, direct disciplinary action against the offending prosecutor would appear to be a more appropriate response than subjecting the criminal justice system and the victims of the crime to the burden of a retrial even though the error in question plainly did not infect the verdict at the first trial.

[9] Indeed, prior to its decision in the instant case, the Seventh Circuit had also held that the constitutional harmless error doctrine applied to comments by the prosecutor on the defendant's silence. Thus, in *United States* v. *Buege*, *supra*, it held that such a remark "requir[es] a determination of its probable effect on the jury in combination with all the evidence presented. When sufficient evidence exists so that the trial judge can declare beyond a reasonable doubt that the error was harmless, such error does not require reversal." 578 F.2d

3. It is clear that the decision of the court below is inconsistent with *Chapman* and with the decisions of other courts of appeals. Assuming, arguendo, that the prosecutor's remarks did constitute prohibited indirect comment on the respondents' failure to testify,[10] the court should have considered whether the government had shown that the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, *supra*, 386 U.S. at 24. If this was shown, the respondents' right to a fair trial was not compromised, and there

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at 189, citing *Chapman* v. *California*, *supra*. See also *United States* v. *Rodriguez*, 627 F.2d 110, 113 (7th Cir. 1980); *United States* v. *Muscarella*, 585 F.2d 242, 250 (7th Cir. 1978).

[10] It is far from clear that the prosecutor's argument was such a comment. As the court below noted (App. A, *infra*, 4a), references to evidence as "uncontroverted" or "unchallenged" are improper only when the statements are intended to be, or will naturally and necessarily be taken by the jury to be, comments on the defendants' failure to testify. *United States* v. *Jenkins*, 544 F.2d 180 (4th Cir. 1976), cert. denied, 431 U.S. 931 (1977); *United States* v. *Bartemio*, 547 F.2d 341, 346 (7th Cir. 1974); *Sanchez* v. *Heggie*, 531 F.2d 964, 966 (10th Cir.), cert. denied, 429 U.S. 849 (1976). In context, the prosecutor here was evidently summarizing the evidence produced on the defendants' behalf at trial, and noting that it had focused on the victims' behavior before the incident and Newcomb's delay in informing the police, rather than attempting to establish alibis or dispute the victims' version of the events (see pages 4-6, *supra*). The district court so interpreted the statement (Tr. 973). Contrary to the assertion of the court of appeals (App. A, *infra*, 4a), witnesses other than defendants could have disputed the victims' testimony. For example, respondents might have called alibi witnesses, or have attempted to establish through either the owner of the garage or respondent Stewart's mother that the victims' version of events was unreliable. Indeed, two defense attorneys made just such use of Mrs. Stewart's testimony in their closing arguments (Tr. 886, 937).

was accordingly no basis for the court of appeals' reversal of the convictions. Cf. *United States* v. *Morrison*, 449 U.S. 361, 365-366 (1981).

While this Court may prefer to leave the matter for consideration by the court of appeals on remand, we think there is little room for dispute that any inference the jury may have drawn from the prosecutor's closing argument about the defendants' failure to testify was harmless beyond a reasonable doubt in the circumstances of this case, in which there was overwhelming evidence of the respondents' guilt. This evidence included not only positive identifications by all three victims, who had ample opportunity to observe their assailants at close range over an extended period of time, but also discovery of personal property of the victims at respondent Stewart's apartment, the presence of respondent Williams fingerprints on the automobile from which the girls had been abducted, photographic and testimonial evidence establishing that the victims had been assaulted and had not consented to any of the sexual activity (*e.g.*, Tr. 627-631), and other evidence corroborative of respondents' guilt. Under the circumstances, it is not surprising that the court of appeals itself acknowledged that there was "clear evidence of guilt" (App. A, *infra*, 5a).

Not only was the evidence of guilt exceptionally strong, but the error found by the court of appeals was at most marginal. See note 10, *supra*. Any oblique reference the prosecutor may be deemed to have made in this case to respondents' failure to testify contrasts sharply with the repeated and direct references by both prosecutor and court deemed not harmless in *Chapman*. In light of the ambiguity of the prosecutor's remarks, it is scarcely possible that they contributed in any way to the verdicts.

Finally, even assuming a court of appeals retains some discretion to reverse for harmless *Griffin* violations, we submit that the action in this case constituted an abuse of such discretion, both because of the "magnitude of the crimes committed" (App. A, *infra*, 5a) and because of the heavy price a retrial would impose upon the innocent victims of this heinous offense, who would be required once more to undergo the trauma of testifying in detail in open court about their harrowing ordeal.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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FEBRUARY 1982

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 80-1224, 80-1225, 80-1246, 80-1247, and 80-1398

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

KELVIN HASTINGS, GABLE GIBSON, NAPOLEON STEWART, GREGORY LAMONT WILLIAMS, and KEVIN WENDELL ANDERSON, DEFENDANTS-APPELLANTS

Appeals from the United States District Court for the Southern District of Illinois, East St. Louis Division
No. 79-CR-05401-E—JAMES L. FOREMAN, *Judge*

ARGUED JANUARY 8, 1981—
DECIDED SEPTEMBER 22, 1981

Before SWYGERT and FAIRCHILD, *Senior Circuit Judges*, and SPRECHER, *Circuit Judge*.

PER CURIAM. Defendants-appellants Napoleon Stewart, Gregory Williams, Gable Gibson, Kevin Anderson, and Kelvin Hastings allege a number of grounds for reversal of their convictions of three fed-

eral offenses: kidnapping in violation of 18 U.S.C. § 1201(a)(1); transporting a woman across state lines for immoral purposes in violation of the Mann Act, 18 U.S.C. § 2421; and conspiracy to commit the foregoing offenses in violation of 18 U.S.C. § 371. Only one of the grounds, prosecutorial misconduct, is of such magnitude as to require reversal. We shall treat that issue in this opinion. The remaining issues are being disposed of in an unpublished order filed simultaneously with this opinion.

I.

About 2:00 a.m. on October 11, 1979, three women were passengers in a car driven by Randy Newcomb in East St. Louis, Illinois. Five men, later identified as the defendants, and riding in a turquoise Cadillac, forced Newcomb's car off the road. Two of the women were taken from the car, and one of them was raped at the scene in the presence of Newcomb. The women were then put into the Cadillac and taken to St. Louis, Missouri, where they were raped and subjected to deviant sex acts.

The women, upon being released from their captors about 6:00 a.m. on October 11, contacted the St. Louis police and furnished descriptions of the five subjects, the vehicle, and the locations of the sexual activity. Acting upon this information, the police located the residence of Napoleon Stewart. The police entered after receiving consent from Stewart's mother. They located Stewart in his home, and placed him under arrest; he later identified the other defendants and the vehicle. The police then arrested Williams, Gibson, Anderson, and Hastings; they also found and seized Williams's turquoise Cadillac. Each defendant was identified by one or more of the victims at lineups arranged by the police.

After a four-day trial, the jury returned guilty verdicts as to each defendant on all counts. The trial judge ordered prison sentences ranging from forty to fifty years. These appeals followed.

The issue that requires reversal relates to the assistant United States attorney's final argument to the jury. The defendants contend that his remarks were so prejudicial as to deny them a fair trial. The alleged prejudice stems from the fact that the prosecution alluded to the failure of the defendants to deny raping and kidnapping the three women. The pertinent part of the summation appears in the margin.*

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* MR. HURSEY [prosecutor]: . . . Let's look at the evidence the defendants put on here for you so that we can put that in perspective. I'm going to tell you what the defendants did not do. Defendants on cross-examination and—

MR. BOOTH [defense counsel]: I'll object to that, Your Honor. You're going to instruct to the contrary on that and the defendants don't have to put on any evidence.

MR. HURSEY: That's correct, Your Honor.

THE COURT: That's right, they don't. They don't have to.

MR. HURSEY: But if they do put on a case, the Government can comment on it. The defendants at no time ever challenged any of the rapes, whether or not that occurred, any of the sodomies. They didn't challenge the kidnapping, the fact that the girls wer in East St. Louis and they were taken across to St. Louis. They never challenged the transportation of the victims from East St. Louis, Illinois to St. Louis, Missouri, and they never challenged the location or whereabouts of the defendants at all the relevant times. They want you to focus your attention on all of the events that were before all of the crucial events of that evening. They want to pull your focus away from the beginning of the incident in East St. Louis after they were bumped, and then the proceeding events. They want you to focus to the events prior to that.

This court's statement in *United States v. Buege*, 578 F.2d 187 (7th Cir.), *cert. denied*, 439 U.S. 871 (1978), applies with full force to the prosecutorial remarks here:

> Direct reference by a prosecutor to a defendant's election not to testify at trial is clearly proscribed. *Griffin v. California*, 380 U.S. 609 (1965). Indirect comments such as the prosecutor's references in this case to "uncontradicted testimony" constitute error when the statements are "manifestly intended to be or [are] of such a character that the jury [will] naturally and necessarily take [them] to be comment on the defendant's failure to testify." *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968). This court has previously held that when a prosecutor refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony, such reference necessarily focuses the jury's attention on the defendant's failure to testify and constitutes error. *United States v. Handman*, 447 F.2d 853, 855 (7th Cir. 1971). *See United States v. Poole*, 379 F.2d 645, 649 (7th Cir. 1967).

578 F.2d at 188.

Only the five defendants and the three victims of the kidnapping and rapes were present when the crimes occurred (other than the rape at East St. Louis). The women testified that these events took place. Only the defendants could have disputed that testimony. It is difficult to imagine a more pointed allusion to the failure of the defendants to take the witness stand other than a direct reference to such failure. Equivocal interpretation is not possible.

As we recently said in *United States v. Rodriguez*, 627 F.2d 110, 113 (7th Cir. 1980): "The remarks, harmless or not, infringing upon such a basic and elementary constitutional underpinning of our justice system, simply should not occur." Despite the magnitude of the crimes committed and the clear evidence of guilt, an application of the doctrine of harmless error would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights.

The convictions are reversed and the case is remanded for a new trial.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Per Curiam Opinion
Unpublished Per Curiam Order

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 22, 1981

Before HON. LUTHER M. SWYGERT,
Senior Circuit Judge

HON. THOMAS E. FAIRCHILD,
Circuit Judge

HON. ROBERT A. SPRECHER,
Circuit Judge

Nos. 80-1224, 80-1225
80-1246, 80-1247
80-1398

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

KELVIN HASTINGS, GABLE GIBSON, NAPOLEON STEWART, GREGORY LAMONT WILLIAMS, and KEVIN WENDELL ANDERSON, DEFENDANTS-APPELLANTS

Appeals from the United States District Court for the Southern District of Illinois, East St. Louis Division

No. 79-CR-05401-E

Judge James L. Foreman

JUDGMENT—ORAL ARGUMENT

These appeals were heard on the record from the United States District Court for the Southern District of Illinois, East St. Louis Division, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in these causes appealed from be, and the same is hereby, REVERSED and REMANDED, in accordance with the opinion and order of this Court filed this date.

A True Copy:

Teste:

/s/ Dolores Rosellina
Deputy Clerk of the
United States Court of Appeals
for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 20, 1981

Before. HON. LUTHER M. SWYGERT,
Senior Circuit Judge

HON. THOMAS E. FAIRCHILD,
Senior Circuit Judge

HON. ROBERT A. SPRECHER,
Circuit Judge

Nos. 80-1224, 80-1225
80-1246, 80-1247, and
80-1398

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

KELVIN HASTINGS, GABLE GIBSON, NAPOLEON STEWART, GREGORY LAMONT WILLIAMS, and KEVIN WENDELL ANDERSON, DEFENDANTS-APPELLANTS

Appeals from the United States District Court
for the Southern District of Illinois

No. 79-05041-E

James L. Foreman, Judge

On consideration of the petition for rehearing filed by counsel for the plaintiff-appellee,

IT IS ORDERED that said petition for rehearing be, and the same is hereby DENIED.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 384474 761

Joint Appendix

Office - Supreme
FIL
AUG 10
ALEXANDER
CL

No. 81-1463

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

KELVIN HASTING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~FOURTH~~ SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 3, 1982
CERTIORARI GRANTED MAY 17, 1982

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1463

UNITED STATES OF AMERICA, PETITIONER

v.

KELVIN HASTING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~FOURTH~~ SEVENTH CIRCUIT

JOINT APPENDIX

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CRIMINAL DOCKET — U.S. District Court

82-50001-02

WILLIAMS, GREGORY LAMONT

U.S. TITLE/ SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Conspiracy Ct. 1	1
18:1201(a)(1)	Kidnaping Ct. 2	1
18:2421	Interstate transportation for immoral purposes Ct. 3	1

1979

November 15—Return of Indictment entered. 1-3—Indictment filed. 11-12—Praecipe for Warrant filed. Warrant issued.

November 28—31 Order entered Appointing William L. Gagen counsel for deft. Dated Nov. 27, 1979.

November 30—Called for Arraignment. See Master Docket Sheet.

82-500[illegible]1

GIBSON, GABLE DARRYL

U.S. TITLE/ SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Conspiracy Ct. 1	1
18:1201(a)(1)	Kidnaping Ct. 2	1
18:2421	Interstate transportation for immoral purposes Ct. 3	1

1979

November 15—Return of Indictment entered. 1-3—Indictment filed. 13-14—Praecipe for Warrant filed. Warrant issued.

November 28—32 Order entered Appointing T. Scott Richardson counsel for Deft. Dated Nov. 27, 1979.

November 30—Called for Arraignment. See Master Docket Sheet.

82-50001

ANDERSON, KEVIN WENDELL

U.S. TITLE/ SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Conspiracy Ct. 1	1
18:1201(a)(1)	Kidnaping Ct. 2	1
18:2421	Interstate transportation for immoral purposes Ct. 3	1

1979

November 15—Return of Indictment entered. 1-3—Indictment filed. 15-16—Praecipe for Warrant filed. Warrant issued.

November 28—33 Order entered finding the deft. is financially unable to obtain counsel and Appointing David Booth, FPD to represent the deft. (S) Dated Nov. 27, 1979.

November 30—Called for Arraignment. See Master Docket Sheet.

82-50001

HASTING, KELVIN

U.S. TITLE/ SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Conspiracy Ct. 1	1
18:1201(a)(1)	Kidnaping Ct. 2	1
18:2421	Interstate transportation for immoral purposes Ct. 3	1

1979

November 15—Return of Indictment entered. 1-3—Indictment filed. 17-18—Praecipe for Warrant filed. Warrant issued.

November 28—34 Order entered Appointing Steven Katzman counsel for the deft. Dated Nov. 27, 1979.

November 30—Called for Arraignment. See Master Docket Sheet.

82-50001

STEWART, NAPOLEON

U.S. TITLE/ SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Conspiracy Ct. 1	1
18:1201(a)(1)	Kidnaping Ct. 2	1
18:2421	Interstate transportation for immoral purposes Ct. 3	1

1979

November 15—Return of Indictment entered. 1-3—Indictment filed. 9-10—Praecipe for Warrant filed. Warrant issued.

November 28—30 Order entered Appointing Frederick J. Hess counsel for deft. Dated Nov. 27, 1979.

November 30—Called for Arraignment. Each deft. enters a plea of not guilty to all counts.

1980

January 16—All 5 defts. are present in the Courtroom. Called for Hearing on Motions for Suppression. * * *

January 17—All attys. and defts. present. Further testimony. * * * [e]ach Motion of each defendant is denied by the Court as to Suppression of Identification.

Motion for Severance. Court will take this motion under advisement and rule later.

Motion to Suppress alleged statement of Deft. Gibson denied.

Hearing on Motion to Suppress Evidence of Deft. Williams. Motion denied.

Hearing on Deft. Stewart's Motion to Suppress evidence. Denied by the Court.

Court denies each defendant's Motion for Severance. Motions to Dismiss Denied.

January 21—All parties present. Called for jury trial. Jury panel sworn. * * * Opening statement by Govt. Opening statement by Atty. Hess and Atty. Booth. At sidebar Motion Atty. Gagen moves for mistrial. Denied. Govt. witness testifies. Recessed for the day.

January 22—All parties present. Further testimony. * * *

January 23—All parties present. * * * Further testimony. Jury sent home.

January 24—All parties present. Further testimony. * * * Govt. rests at 1:45 P.M. Atty. Gagen has asked to waive opening statement. Atty. Richardson makes oral statement. Atty. Katzman makes oral statement. Atty. Hess has no evidence to present only wishes to show to the jury face and neck marks on deft. Stewart. Atty. Hess rests at 1:50 P.M. Atty. Gagen presents evidence and rests at 4:10 P.M. Atty. Richardson presents evidence and rests at 4:10 P.M. Atty. Booth presents evidence and rests at 4:00 P.M. Atty. Katzman presents evidence and rests at 4:07 P.M. Jury sent home.

January 25—Open Court All parties present. Closing argument by Govt. Closing Argument by counsel for defts. Closing argument by Govt. Court instructs the jury. Oath to Bailiff. Jury retired at 1:40 P.M. to consider the evidence. Open Court, jury not present. Defts, and attys. present. Atty. Hess moves for mistrial due to statement made by Govt. in closing argument. All deft. attys. join in this motion. Motion denied as to all 5 defts. Jury returned the following verdicts at 4:30 P.M.

[180] We, the jury, find the defendant Napoleon Stewart guilty as charged in Count I of the Indictment, guilty as charged in Count II of the Indictment, and guilty as charged in Count III of the Indictment.

[181] We, the jury, find the defendant Gregory Lamont Williams guilty as charged in Count I of the Indictment, guilty as charged in Count II of the Indictment, and guilty as charged in Count III of the Indictment.

[182] We, the jury, find the defendant Gable Darryl Gibson guilty as charged in Count I of the Indictment, guilty as charged in Count II of the Indictment, and guilty as charged in Count III of the Indictment.

[183] We, the jury, find the defendant Kevin Wendell Anderson guilty as charged in Count I of the Indictment, guilty as charged in Count II of the Indictment, and guilty as charged in Count III of the Indictment.

[184] We, the jury, find the defendant Kelvin Hasting guilty as charged in Count I of the Indictment, guilty as charged in Count II of the Indictment, and guilty as charged in Count III of the Indictment.

Jury polled. Court adjudges each defendant guilty in manner and form as charged in the Indictment after the jury's finding each deft. guilty on all 3 counts. Presentence report ordered. Disposition to be set at a later date.

February 14—219 STEWART JUDGMENT (JLF) Ct. 1, 5 yrs. impr.; Ct. 2, 50 yrs. impr.; Ct. 3, 5 yrs. impr., conc. w/ea. other. Deft. advised of appeal rights

220 WILLIAMS JUDGMENT (JLF) Ct. 1, 5 yrs. impr.; Ct. 2, 50 yrs. impr.; Ct. 3, 5 yrs. impr., conc. w/ea. other. Deft. advised of appeal rights.

221 GIBSON JUDGMENT (JLF) Ct. 1, 5 yrs. impr., Ct. 2, 40 yrs. impr.; Ct. 3, 5 yrs. impr., conc. w/ea. other. Deft. advised of appeal rights.

222 HASTING JUDGMENT (JLF) Ct. 1, 5 yrs. impr.; Ct. 2, 50 yrs. impr.; Ct. 3, 5 yrs. impr., conc. w/ea. other. Deft. advised of appeal rights.

February 19—227 HASTING NOTICE OF APPEAL in forma pauperis cc: U.S. Atty., Court Reporter, Clk. USCA, all counsel, and deft.

February 22—229 WILLIAMS NOTICE OF APPEAL in forma pauperis cc: U.S. Atty., Court Reporter, Clerk USCA, all counsel and deft.

February 25—232 STEWART NOTICE OF APPEAL in forma pauperis cc: U.S. Atty., Court Reporter, Clerk USCA, all counsel and deft.

February 27—237 STEWART ORDER (JLF) granting leave to appeal in forma pauperis Dated Feb. 25, 1980

238 WILLIAMS ORDER (JLF) granting leave to appeal in forma pauperis Dated Feb. 22, 1980

239 GIBSON ORDER (JLF) granting leave to appeal in forma pauperis Dated Feb. 14, 1980

240 HASTING ORDER (JLF) granting leave to appeal in forma pauperis Dated Feb. 19, 1980

March 13—STEWART, WILLIAMS, GIBSON, HASTING RECORD ON APPEAL including exhibits, transcript of suppression hearing and jury list forwarded to USCA

March 13—258 ANDERSON JUDGMENT (JLF) Ct. 1, 5 yrs. impr.; Ct. 2, 40 yrs. impr.; Ct. 3, 5 yrs. impr., conc. w/ea. other.

March 19—[260] ANDERSON NOTICE OF APPEAL in forma pauperis cc: U.S. Atty., Court Reporter, Clk. USCA, counsel and deft.

April 1—ANDERSON RECORD ON APPEAL forwarded to USCA

April 7—ANDERSON RECEIPT of record by USCA on 4/3/80 acknowledged

August 4—STEWART RETURN ON J&C. Deft. Delivered on 6/27/80 to USP, Terre Haute, Ind. Deft. delivered on July 11, 1980 to Warden, USP, Leavenworth, Kansas

ANDERSON RETURN ON J&C. Deft. delivered on July 25, 1980 to USP, Terre Haute, Ind.

HASTING RETURN ON J&C. Deft. delivered on July 16, 1980 to USP, Leavenworth, Kansas. Deft. delivered on 7/25/80 to USP Terre Haute, Ind.

1981

December 4—282 ALL DEFTS. MANDATE OF USCA-7th Cir. dated Sept. 22, 1981 that the judgment of the said District Court in these causes appealed from be, and the same is hereby REVERSED and REMANDED for a new trial

291 ALL DEFTS. CERT. COPY OF ORDER OF USCA-7th Cir. dated Nov. 20, 1981: On consideration of the petition for rehearing filed by counsel for the plaintiff

February 26—ALL DEFTS: ORDER (WLB) under 3161(h)(8) that because petition of certiorari is pending before US Supreme Court and defendants are already in custody for sentences in other cases, cause is continued to May 3, 1982.

March 19—ALL DEFTS: Record mailed to US Supreme Court, pursuant to request from 7th Circuit all parties notified of mailing Cert. Mail #P26 2379853

April 30—ALL DEFTS: MOTION to continue (USA)

May 4—ALL DEFTS: ORDER (WLB) that motion to continue is GRANTED. Cause continued to July 6, 1982

A True Copy
Attest:
A. MARVIN HELART
Clerk, U.S. District Court
Southern Dist. of Illinois

By _____
Deputy C'erk
Date 5/21/82

U.S. COURT OF APPEALS
Seventh Circuit — Docket

General No. 80-1224
Related Nos. 80-1225, 80-1246
80-1247, 80-1398

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KELVIN HASTING,
Defendant-Appellant.

CERTIFIED COPY
A True Copy:
Tests:

Clerk of the United States
Court of Appeals for the
Seventh Circuit.

1980

March 6—Entered CJA order appointing Mr. Steven E. Katzman as counsel for the appellant.

March 6—Entered order adopting the following procedural schedule Rule 33:

1. these appeals shall be consolidated for purposes of briefing.

April 17—Entered order adopting the following procedural schedule Rule 33:

1. these appeals are consolidated for purposes of oral argument.

1981

January 8—Heard and taken under advisement.

September 22—Filed Opinion Per Curiam, REVERSED & REMANDED. (all #s)

September 22—Entered final judgment order per curiam REVERSED AND REMANDED. (all #s)

November 20—Entered order that petition for rehearing is DENIED. (all #s)

November 30—MANDATE ISSUED RECORDS RETURNED. (all #s)

1982

February 8—Filed notice from Supreme Court of filing for petition for cert. on 2/3/82 in no. 81-1463. (80-1398 80-1247)

March 18—Filed notice from Supreme Court of filing for petition for cert in no. 81-6379 on 3/9/82.

May 20—Filed notice from supreme court that petition for cert filed by K. Hasting is DENIED. (this no. only)

May 20—Filed notice from supreme court that USA's petition for cert. is GRANTED. (all #s)

U.S. COURT OF APPEALS
Seventh Circuit — Docket

General No. 80-1225
Related Nos. 80-1224, 80-1246
80-1247, 80-1398

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GABLE GIBSON,
Defendant-Appellant.

CERTIFIED COPY
A True Copy:
Tests:

Clerk of the United States
Court of Appeals for the
Seventh Circuit.

1980

March 6—Entered CJA order appointing Mr. Scott Richardson, as counsel for the appellant.

March 6—Entered order adopting the following procedural schedule Rule 33:

1. These appeals shall be consolidated for purposes of briefing.

April 17—Entered same procedural schedule as 80-1224. (all #s)

July 8—Entered order GRANTING motion of Scott Richardson to withdraw as attorney for appellant, Gable Gibson filed 5/27/80. This court's previous order of 7/1/80 in 80-1225, denying motion to withdraw is VACATED. The appellant Gable Gibson shall be represented by Paul V. Esposito who has been appointed pursuant to the provisions of the CJA.

1981

January 8—Heard and taken under advisement.

September 22—Filed Opinion Per Curiam, Reversed & REMANDED. (all #s)

September 22—Entered final judgment order per curiam REVERSED & REMANDED. (all #s)

November 20—Entered order that petition for rehearing is DENIED. (all #s)

November 30—MANDATE ISSUED RECORDS RETURNED.

1981

March 11—Filed notice of filing petition for cert. on 3/5/82; Sup. Ct. No. 81-6344

May 20—Filed notice from supreme court that petition for cert was GRANTED. (all #s)

May 20—Filed order from sup. ct. DENYING cert.

U.S. COURT OF APPEALS
Seventh Circuit — Docket

General No. 80-1246
Related Nos. 80-1247, 80-1224
80-1225, 80-1398

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NAPOLEON STEWART,
Defendant-Appellant.

CERTIFIED COPY
A True Copy:
Tests:

Clerk of the United States
Court of Appeals for the
Seventh Circuit.

1980

April 17—Entered CJA order appointing William L. Gagen as counsel for appellant.

April 17—Entered same procedural schedule as 80-1224. (all #s)

April 17—Entered CJA order appointing Frederick J. Hess as counsel for appellant.

April 17—Entered order adopting the same procedural schedule as 80-1224. (all #s)

1981

January 8—Heard and taken under advisement.

September 22—Filed Opinion Per Curiam, REVERSED & REMANDED. (all #s)

November 20—Entered order that petition for rehearing is DENIED. (all #s)

November 30—MANDATE ISSUED RECORDS RETURNED.

1982

May 20—Filed notice from supreme court that petition for cert is GRANTED. (all #s)

U.S. COURT OF APPEALS
Seventh Circuit — Docket

General No. 80-1247
Related Nos. 80-1246, 80-1224
80-1225, 80-1398

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GREGORY LAMONT WILLIAMS,
Defendant-Appellant.

CERTIFIED COPY
A True Copy:
Tests:

Clerk of the United States
Court of Appeals for the
Seventh circuit.

1981

January 8—Heard and taken under advisement.

September 22—Filed Opinion Per Curiam, REVERSED & REMANDED. (all #s)

November 20—Entered order that petition for rehearing is DENIED. (all #s)

November 30—MANDATE ISSUED RECORDS RETURNED.

1982

Feburary 8—Filed notice of filing for petition for cert. in Supreme Court no. 81-1463 on 2/3/82. (80-1247 & 80-1398)

March 18—Filed notice of filing petition for cert in Sup. Ct. on 3/5/82, #81-6373

May 20—Filed notice that petition from supreme court that petition for cert is GRANTED. (all #s)

May 20—Filed order from Sup. Ct. DENYING petition for cert.

U.S. COURT OF APPEALS
Seventh Circuit — Docket

General No. 80-1398

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN WENDELL ANDERSON,
Defendant-Appellant.

CERTIFIED COPY
A True Copy:
Tests:

Clerk of the United States
Court of Appeals for the
Seventh Circuit.

1980

April 17—Entered same procedural schedule as 80-1224. (all #s)

1981

January 8—Heard and taken under advisement.

September 22—Filed Opinion Per Curiam, REVERSED & REMANDED. (all #s)

September 22—Entered final judgment order per curiam REVERSED & REMANDED. (all #s)

November 20—Entered order that petition for rehearing is DENIED. (all #s)

November 30—MANDATE ISSUED RECORDS RETURNED.

1982

February 8—Filed notice from Supreme Court of filing for petition for cert. on 2/3/82 in no. 81-1463. (80-1224 80-1247)

May 20—Filed notice from supreme court that petition for cert was GRANTED. (all #s)

Excerpts From Prosecutor's Closing Argument

[873] Let's look at the evidence the defendant put on here for you so that we can put that in perspective. I'm going to tell you what the defendant did not do. Defendants on cross-examination and—

MR. BOOTH: I'll object to that, Your Honor. You're going to instruct to the contrary on that and the defendants don't have to put on any evidence.

MR. HURSEY: That's correct, Your Honor.

THE COURT: That's right, they don't. They don't have to.

MR. HURSEY: But if they do put on a case, the Government can comment on it. The defendants at no time ever challenged any of the rapes, whether or not that [874] occurred, any of the sodomies. They didn't challenge the kidnapping, the fact that the girls were in East St. Louis and they were taken across to St. Louis. They never challenged the transportation of the victims from East St. Louis, Illinois to St. Louis, Missouri, and they never challenged the location or whereabouts of the defendants at all the relevant times. They want you to focus your attention on all of the events that were before all of the crucial events of that evening. They want to pull your focus away from the beginning of the incident in East St. Louis after they were bumped, and then the proceeding events. They want you to focus on the events prior to that. And you can use your common sense and still see what that tells you. So, in conclusion, I'd just like to speak very plainly. All your job is as a juror is to look at the evidence as a whole. That's all the people of the United States want you to do is look at the evidence as a whole, as it's been presented. And what will the evidence show if you look at it as a whole? It will show that the five defendants that I have alluded to during this half hour, went on a rampage of violence, sex and intimidation whereby they abducted three girls from St. Louis, Illinois, made one of them perform sodomy and raped her in Illinois and then during the course of the ride to St. Louis, three acts are perpetuated, and in St. Louis they're perpetuated. So, when you go back in the room to [875] deliberate, look at all the evidence. That's all the Government is

asking you to do, and when you do, you will come to one conclusion and that is that these five defendants are guilty as charged on all three counts and then you can once again reaffirm that this is a country governed by the rules of law and not by the rule of the mob. Thank you.

THE COURT: Mr. Hess.

MR. HESS: Your Honor, I have a motion based on the argument and particularly the last portion of it, that I would like to make to the Court. I can do that now or I can do it later.

THE COURT: I'll give you the leave to do it later. Let's proceed, and it will be noted for the record and you may put it in the record later on, sir.

MR. HESS: Thank you, sir.

MR. BOOTH: Excuse me, Your Honor. Just to make certain, by making closing argument, we're not waiving that right?

THE COURT: I will so consider it that you're not.

MR. BOOTH: Thank you.

* * * *

Argument And Ruling On Motion For Mistrial

[970] MR. RICHARDSON: Your Honor, at this time I'd make a motion for mistrial based upon the argument of Mr. Hursey in his direct argument where he testified as to the burden that the defense failed to meet. He testified that they had no evidence to prove their innocence. He alluded to that. He has completely improperly argued. We raise it at the time. Mr. Booth asked you if we could reserve it, without [971] making our closing argument, without waiving our right to make that motion.

THE COURT: Yes, and you have that right to preserve it.

MR. RICHARDSON: And that's what we're doing now, moving for mistrial based upon the argument that is totally improper. The burden, of course, never shifts to the defendants and that's what certainly he intimated by his argument. It's totally improper. Maybe Mr. Booth would want to say more.

MR. BOOTH: I just join in the same motion and just point out that immediately after I objected about the shifting of the burden of proof, Mr. Hursey went right ahead and made statements that only—the clear implication was that these defendants could have explained that they weren't in the car or these events didn't happen, and that's a comment on them not testifying. I don't know how you would rule, but it seems to me at least it's getting awfully close to the prohibited area of commenting on it.

* * * *

[972] MR. HURSEY: Your Honor, the Court is well aware of Berger versus U.S., 1935 Supreme Court Case where the Supreme Court set out the duty of the U.S. Attorney and one phrase in this case is that the U.S. Attorney makes fair blows. Let me take this—can strike hard blows as long as they're fair blows. I don't have to tell this Court if defendant put on a case the Government can comment on a case and naturally we can't comment on defendants failure to testify, and didn't do that. The Court will remember my comment to the effect that I said the defendants, that during their cross-examination and the witnesses they put on, which at that point they cut in on me. I made no reference whatsoever to the fact that the actual defen-

dants themselves did not testify and this Court is well aware at that point the jury has already heard the evidence in the case and not only did counsel for the [973] Government, but counsel for the defendants would characterize them, what different defendants said. I mean, I had a couple of statements attributed to me that I didn't even say, so, you know, the standard by which to level that—

THE COURT: Well, obviously this is a hard fought case and I do think that Mr. Hursey's right. He was interrupted. I don't believe he did quite complete the statement that he made. My observation of that and his comments—I thought what he had made there was leading up to—was in the context of maybe commenting on what evidence had been presented, maybe not being directed particulary to the real issues involved, and we're on other matters. I don't know whether that was what he was going to say or not, but there has been that involved in the case. So, that was the way I would attribute that. The next time maybe they ought to just let you say it all, is that right? Maybe you will say something—I don't know—prejudicial. But anyway, that's it. Of course, I would deny the motion for a mistrial.

MS. JOHNSON: Thank you, Your Honor.

MR. RICHARDSON: Thank you, sir.

THE COURT: Court's in recess.

* * * *

Supreme Court of the United States

No. 81-1463

UNITED STATES,

Petitioner,

v.

KELVIN HASTING, *et al.*

ORDER ALLOWING CERTIORARI. Filed May 17, 1982

The petiion herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 376111 1007

Opposition

1

No. 81-1463

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

KELVIN HASTING, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT KELVIN HASTING'S BRIEF IN OPPOSITION

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REASONS FOR DENYING WRIT

The appellate court correctly and simply exercised its supervisory powers in reversing the defendants' convictions. It is well established that the courts have such powers to deter general government misconduct, and in particular, to discourage prosecutorial misconduct at trial. Mesarosh v. U. S., 352 U.S. 1, 1 L.ed. 2d 1, 77 S. Ct. 1 (1956) and Donnelly v. DeChristoforo, 416 U.S. 637, 40 L. ed. 2d 431, 94 S. Ct. 1868 (1974).

In describing the conduct of the prosecutor the appellate court said:

> "It is difficult to imagine a more pointed allusion to the failure of the defendants to take the witness stand other than a direct reference to such failure. Equivocal interpretation is not possible." (Pet. 4a).

Faced with the above-described misconduct, and in light of repeated prior admonitions to the Government, the Court summarily reversed without unnecessary discussion. The Court had sternly warned of such potential result in U. S. v. Buege, 578 F. 2d, 187, 189, 190 (7th Circ. 1978):

> "We therefore caution federal prosecutors in this circuit that continued use of indirect references of this kind may cause us to follow the First Circuit and establish a per se rule. It appears that what we said on a previous occasion has not been taken seriously."

Following Buege the court issued an unpublished order on February 27, 1979 in U. S. v. Pleas Moody, No. 78-1981. The

court cautioned that:

> "Continued failure to heed the admonition of this court would demonstrate that the admonition was ineffective, calling therefore for summary reversal." U.S. v. Rodriguez, 627 F. 2d 110, 112 (7th Circ. 1980).

Chief Judge Fairchild directed a copy of this order to each U. S. Attorney for their attention to this warning. U.S. v. Rodriguez, 627 F. 2d 110, 112 (7th Circ. 1980). Though in Rodriguez the Court followed the traditional harmless error measures of Chapman v. California, 386 U.S. 18, 17 L.ed. 2d 705, 87 S. Ct. 824 (1967), it again stated the admonition and cautioned that it did so "with confidence in the United States Attorneys in this circuit . . . " U.S. v. Rodriguez, 627 F. 2d 110, 113 (7th Circ. 1980).

Understandably, the Court finally had its confidence shaken. Surely there can be no surprise to the Government at the Court's treatment of this particular misconduct. The treatment requires little analysis or explanation.

Furthermore, the Government mistakenly contends that these cases are contrary to Chapman v. California, 386 U.S. 18, 17 L.ed. 705, 87 S. Ct. 824 (1967).

Buege and Rodriguez each applied the tests of Chapman to the prosecutor's misconduct. This Court's impatience may have simply caused it to follow these cases without measuring the tests of Chapman for harmless error.

In summary, this decision is both consistent with Chapman

and a proper and forewarned use of the court's inherent supervisory powers.

CONCLUSION

The Government's petition should be denied.

Respectfully Submitted,

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ORIGINAL

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BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI AND A CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES respondent Kelvin Hasting, by his court-appointed attorney, J. William Lucco, and pursuant to United States Supreme Court Rule 46.1 respectfully requests this Honorable Court to allow him to proceed in forma pauperis in this case. In support of his motion respondent states that J. William Lucco was appointed by the District Court for the Southern District of Illinois pursuant to the Criminal Justice Act of 1964.

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Opposition

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CASE NO. 81-1463

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1981 TERM

UNITED STATES OF AMERICA, Petitioner, -v- KELVIN HASTINGS, et al, Respondents.	)	On Petition For Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

Submitted in Behalf of
Respondent Kevin Wendell Anderson

Respectfully submitted by:

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ATTORNEY FOR KEVIN WENDELL ANDERSON

CASE NO. 81-1463

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OCTOBER, 1981 TERM

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	On Petition For Writ of
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KELVIN HASTINGS, et al,	)	
	)	
Respondents.	)	

BRIEF IN OPPOSITION

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Respectfully submitted by:

ROBERT C. BABIONE
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SUMMARY OF ARGUMENT

Petitioner's assertion that the Court of Appeals failed to apply the constitutional plain error test is incorrect because it takes a single phrase out of context and ignores the actual holding of the case cited by the court. Even if the Government is correct, the case should only be remanded to the Court of Appeals for an express articulation of the correct constitutional or supervisory standard.

ARGUMENT

The complaint of the petitioner centers on a part of the opinion of the Court of Appeals which is a quotation from another case. That part of the opinion is, "The remarks, harmless or not, infringing upon such a basic and elementary constitutional underpinning of our justice system, simply should not occur." That quotation comes from United States v. Rodriguez, 627 F.2d 110, 113 (7th Cir. 1980). That citation is set out in the Court of Appeals' opinion. Presumably, this indicates that the Court of Appeals is following Rodriguez.

The language quoted from Rodriguez is essentially dicta in that case. Rodriguez is correctly ruled under the harmless error test of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). On the same page where the quote set out above appears, there is also the following language:

> "If the evidence of guilt is sufficient to find beyond a reasonable doubt that the error was harmless, reversal may not be required. United States v. Buege, 578 F.2d 187, 189 (7th Cir. 1978). In the present case, we do not view the evidence of guilt as sufficient to erase the seriously prejudicial direct reference."

The conclusion of the court in Rodriguez was as follows:

> "There is no realistic way we can say in these circumstances that all the 'silent' defendants were not prejudiced by the comments and that the error as to any defendant was harmless beyond a reasonable doubt."

Thus, it is very clear that Rodriguez was correctly decided and the Court of Appeals followed that opinion and thereby again applied the Chapman standard.

Alternatively, it may be that the Court of Appeals wishes to exercise its supervisory power over the district courts, as has the First Circuit on this subject. The Rodriguez opinion begins, "A federal prosecutor in final argument has done it again." There is discussion in Rodriguez of the history of prosecutorial misconduct in final argument in the Seventh Circuit.

Respondent Anderson does not believe that the Seventh Circuit was invoking its supervisory powers. However, it could. In any event, the most that this Court should do is remand the case to the Court of Appeals for the Seventh Circuit for an express articulation of the constitutional or supervisory standard.

CONCLUSION

Respondent Anderson prays that the petition for writ of certiorari be denied.

Respectfully submitted,

Robert C Babione

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PROOF OF SERVICE

Comes now Robert C. Babione, court appointed counsel for the Respondent Kevin Wendell Anderson, and certifies that he has caused a true and correct copy of the Respondent's 4-page Brief in Opposition to be served upon the Solicitor General of the United States, Washington, D.C., by causing the same to be placed in a sealed envelope correctly addressed as aforesaid with proper postage fully prepaid and by depositing same in the United States Mails at East St. Louis, Illinois, on the 1st day of March, 1982.

Robert C Babione

ROBERT C. BABIONE

Opposition

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RESPONDENT GABLE GIBSON'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether under the facts and circumstances of this case and in light of the government's continuing misconduct, the court of appeals properly reversed respondent's conviction because of the government prosecutor's comment during closing argument on respondent's failure to testify.

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RESPONDENT GABLE GIBSON'S BRIEF IN OPPOSITION

Respondent Gable Gibson respectfully requests that the Court deny the petition for a writ of certiorari seeking to review the Seventh Circuit decision in this case. The opinion is reported at 660 F.2d 301 (1981).

STATEMENT OF THE CASE

Additional facts should be stated. At trial, the government introduced the testimony of Randy Newcomb, who was allegedly at the scene of the abduction. On direct examination, Newcomb was unable to identify respondent (T. 504-85).

The only evidence connecting respondent with the interstate transportation of the alleged female victims consisted of their testimony at trial. The alleged victims and defendants were the only persons involved in the interstate transportation.

Respondent allegedly rode in the back seat of the car and did not have control over the car (T. 124, 307, 418). Marianne Long, who was seated between two defendants in the front seat, stated that the two were arguing regarding the ultimate destination, but Long could not understand the specifics of the conversation (T. 125-26).

In his closing argument, the prosecutor stated, inter alia, that the evidence respecting the interstate transportation was not challenged.

The only evidence implicating respondent in the alleged rapes and acts of sodomy came from the alleged victims. The prosecutor also stated that this evidence was not challenged.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS PROPERLY REVERSED RESPONDENT'S CONVICTION BECAUSE OF THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT ON RESPONDENT'S FAILURE TO TESTIFY

The decision below correctly responds to long-standing violations in the seventh circuit of defendants' constitutional right to remain silent at trial. It is both authorized by law and mandated by fundamental principles of fairness and justice. The decision needs no further review.

The government's portrayal of the decision is unfair. The petition isolates the decision from the troubling history of litigation regarding prosecutorial comments on the failure to testify. It is precisely the court's disturbing experiences in this area which forced the corrective steps taken here.

Even prior to Griffin v. California [380 U.S. 609 (1965)], the seventh circuit considered comments by prosecutors that evidence is undenied or unrefuted, and it cautioned that such remarks are improper where only a defendant could refute the evidence. United States v. Wright, 309 F.2d 735, 738-39 (7th Cir. 1962) cert. denied 327 U.S. 929 (1963). Nonetheless, the problem continued to surface. United States v. Poole, 379 F.2d 645 (7th Cir. 1967); United States v. Lyon, 397 F.2d 505 (7th Cir.) cert. denied 393 U.S. 846 (1968). The court also warned

that comments that evidence was uncontradicted by cross-examinations could be highly prejudicial, and it stated that prosecutors took the risk that a trial could be rendered unfair. United States v. Handman, 447 F.2d 853, 855-56 (7th Cir. 1971). However, the prosecutors refused to heed the court's directives. United States v. Fearns, 501 F.2d 486 (7th Cir. 1974).

The court was again forced to deal with the problem in United States v. Buege, 578 F.2d 187 (7th Cir.) cert. denied 439 U.S. 871 (1978). Noting that "what we said on a previous occasion has not been taken seriously," the court held that a comment that evidence was uncontradicted constituted error. Id. at 189-90. While the court held the error harmless, it advised the government that it might follow the lead of the first circuit and issue summary reversals if abuses did not abate. Id.

In February 1979, the seventh circuit decided United States v. Pleas Moody, 78-1981, once again cautioning prosecutors that even subtle references to the failure to testify by use of terms such as "uncontradicted" or "unrefuted" were improper, and threatening summary reversals. Although unpublished, the decision was circulated by order of court to all United States attorneys in the circuit with instructions to either disseminate copies to assistant attorneys or circulate an explanatory memorandum. See, United States v. Rodriguez, 627 F.2d 110 (7th Cir. 1980). Significantly, both Buege and Pleas Moody were decided prior to the trial here.

In Rodriguez, supra, the court voiced its growing "sense of futility from the persistent disregard of prior admonitions." 627 F.2d 110, 112. The court recognized that "a defendant's liberty should not so often depend on our struggle with the particular circumstances of a case to determine from a cold record whether or not the prosecutor's remarks were harmless." The court again warned that summary reversals might issue, but it continued to follow the harmless error rule. Id. at 113.

With its patience finally exhausted, the seventh circuit took much-needed action. In this case, the court found that the prosecutor's comments made in the initial portion of closing argument with respect to conduct allegedly involving only the victims and respondents, was an unmistakable comment on respondent's silence:

> It is difficult to imagine a more pointed allusion to the failure of the defendants to take the witness stand other than a direct reference to such failure. Equivocal interpretation is not possible.

(Pet. 4a). Under the circumstances, the court refused to apply to harmless error doctrine to compromise respondent's constitutional rights.

Given the chronic abuse, it is surprising that the court did not take corrective action in an earlier decision.

The court of appeals acted well within its supervisory powers to control procedures.[1] This Court has long recognized that appellate courts have inherent power to maintain civilized standards of criminal justice and procedure in order to deter government misconduct and to protect the fundamental integrity of the court from abuses used to garner convictions. United States v. Payner, 447 U.S. 727,735, (1980); Mesarosh v. United States, 352 U.S. 1, 9, 14 (1956); McNabb v. United States, 318 U.S. 332, 340 (1943). When evidence has been unfairly gathered, it may be suppressed under this rule. Payner, supra; McNabb, supra, Mesarosh, supra.

The Court has stated that courts of appeal possess supervisory power to discourage prosecutorial misconduct occurring at trial. Donnelly v. De Christoforo, 416 U.S. 637, 648 n. 23 (1974); accord: United States v. Robinson, 651 F.2d 1188, 1197 (6th Cir. 1981); Cunningham v. Perini, 655 F.2d 98, (6th Cir. 1981). Thus, in United States v. Smith, 500 F.2d 293 (6th Cir. 1974), the court, invoking its supervisory powers, refused to apply the harmless error doctrine in reversing a conviction based on comments by the prosecutor during closing argument which effectively shifted the burden of proof. Id. at 297.

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1. That the seventh circuit did not articulate its powers is totally irrelevant.

Even more relevant is the first circuit decision in United States v. Flannery, 451 F.2d 880 (1st Cir. 1971). The court reversed a conviction because the prosecutor stated during closing argument that certain evidence was "uncontradicted" by the non-testifying defendant. Id. at 881. Finding that federal prosecutors had persistently ignored previous warnings, the court, through its supervisory powers, fashioned a prospective rule requiring automatic reversal for such comments. The court carved an exception in those cases in which the trial judge immediately interrupted the trial following the improper comment and advised the jury of defendant's right to silence and stated that the prosecutor was guilty of misconduct. Id. at 881-82.[2]

In this case the court of appeals correctly perceived an abuse of the harmless error doctrine. Prosecutors used the doctrine as a sword to make subtle yet undeniable references to a defendant's failure to testify in cases the prosecutors considered safe from reversal. See, United States v. Payner, 447 U.S. 727,738 (1980) (Marshall, J. dissenting). Such conduct is totally improper because no party or attorney has the right to inject error, harmless or otherwise, into a case, especially when

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2. Well prior to trial here, the court of appeals advised prosecutors that Flannery would be adopted in the Seventh circuit if the court's warnings were ignored. Notably, the Flannery exception did not apply here.

that error affects constitutional rights. The court's use of its supervisory power to curb this abuse is clearly authorized.

The government misstates the breadth of the court's holding. The decision neither abdicated the harmless error doctrine or established a "blanket rule" in similar cases. Notably, the court did not impose the Flannery rule, which it had threatened to adopt. Rather, it reversed because the particular respondents' rights were inexcusably violated. Presuming the frequency of constitutional violates persists, the decision here will probably serve as precedent for additional reversals. However, if federal prosecutors demonstrate an appreciation of defendants' fifth amendment rights, the decision does not bar the application of the harmless error doctrine.

Nothing in Chapman v. California, 386 U.S. 18 (1968), or in either 18 U.S.C. §2111 or Fed. R.Crim. P. 52(a) mandates reversal. In Chapman, petitioner argued that all constitutional error must be deemed harmful. While rejecting that broad contention, it acknowledged "that harmless error rules can work very unfair and mischevious results..." Id. at 22,23. Commentators have recognized that too strict an application of the harmless error rule can lead to deliberate misconduct by government officials. See, e.g., Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. Rev. 519, 552-54 (1969); Harmless Constitutional Error: A Reappraisal, 83 Harv. L. Rev. 814 (1970); Principles for Application of the Harmless Error

Standard, 41 U. Chi. L. Rev. 616, 626 (1974). Clearly, the harmless error doctrine functions as a shield protecting the integrity of a trial from innocuous mistakes. The rule was not designed as a sword which can puncture the constitutional mantle given all criminal defendants. It simply does not contemplate repeated and deliberate prosecutorial abuse and, accordingly, the decision here does not contravene the harmless error rule.[3] By the same token, the decision does not violate the principle that supervisory power may be exercised only in the absence of congressional action, because Congress has not authorized the misconduct regularly committed by government prosecutors.

Moreover, the decision below does not create a conflict among circuits. The government's citations are irrelevant. United States v. Parker, 549 F.2d 1217 (9th Cir.) cert. denied 430 U.S. 971 (1977); Berryman v. Colbert, 558 F.2d 1247 (6th Cir. 1976); United States v. White, 444 F. 2d 1274 (5th Cir.) cert. denied 404 U.S. 949 (1971); Coleman v. United States, 420 F.2d 616 (D.C. Cir. 1969); United States ex rel. Satz & Mancusi, 414

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3. By the same token the decision does not violate the principle that supervisory power may be exercised only in the absence of congressional action. Palermo v. United States, 360 U.S. 343 (1959); Wolfle v. United States, 291 U.S. 7 (1934); Funk v. United States, 280 U.S. 371 (1933).

F.2d 90 (2nd Cir. 1969). None of these circuits have experienced the problems beset upon the seventh circuit. In United States v. Sanders, 547 F.2d 1037 (8th Cir. 1977), the eighth circuit warned that continued reference by prosecutors to allegedly "uncontradicted" testimony is "increasingly likely to offend the conscience of the court." Id. at 1043.

Moreover, the first circuit has adopted an automatic reversal rule in appropriate cases. United States v. Flannery, 451 F.2d 880 (1st Cir. 1971), supra at 6. The government's statement that post-Flannery convictions have not been reversed in the absence of prejudice is misleading. Actually, the first circuit has found either that the comments were not directed to a failure to testify or that the error was sufficiently cured by the trial judge.[4] The first circuit's approach under Flannery has been highly successful.

On analysis, the government's suggestions for alternative sanctions against prosecutors lack substance. Prosecutors are absolutely immune from civil liability under 42 U.S.C. §1983 for

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4. United States v. Saverese, 649 F.2d 83 (1st Cir. 1981); United States v. Canas, 595 F.2d 73 (1st Cir. 1979); United States v. Goldman, 563 F.2d 501 (1st Cir. 1977); Lussier v. Gunter, 552 F.2d 385 (1st Cir. 1977); United States v. Hooker, 541 F.2d 300 (1st Cir. 1976); United States v. Farnkoff, 535 F.2d 661 (1st Cir. 1976); United States v. Kubitsky, 469 F.2d 1253 (1st Cir. 1972); United States v. McDonald, 455 F.2d 1259 (1st Cir. 1972); United States v. Medina, 455 F.2d 209 (1st Cir. 1971).

violations of constitutional rights. Imbler v. Pachtman, 424 U.S. 409 (1976). Respondent has not found a single case involving the criminal prosecution of a federal attorney under 18 U.S.C. §§241 and 242, the criminal analog to §1983. Since the Attorney General does not consider the remarks made here to be erroneous, the possibility of criminal action, or any other disciplinary action, is remote. Moreover, it is doubtful that the court of appeals possesses supervisory power to discipline members of the Executive Branch. United States v. Payner, 447 U.S. 727, 737, (Burger, C.J. concurring). Thus, the only effective deterrent to continued and deliberate misconduct lies in the ability to reverse convictions obtained in violation of a defendant's constitutional rights.

Contrary to the government's assertion, the error was not harmless. The comments were undisputably directed toward respondent's failure to testify. In cases involving sexual assaults, a respondent is usually the only person who could contradict testimony. See, Neil v. Biggers, 409 U.S. 188, 200-01 (1972); Runnels v. Hess, 653 F.2d 1359, 1362-63 (10th Cir. 1981). Moreover, the alleged victims were the only persons who rode with respondents across state lines and, therefore, only respondents could have denied their testimony respecting the interstate transportation. As the government well knows, respondent did not have the luxury of an alibi witness. The government's suggestions regarding the use of defense witnesses (Pet. 12) highlights one of

the prejudicial effects of comments that evidence is uncontradicted. Those comments shift the burden of proof from the government to the defendant by focusing attention on the silent defendant's failure to call certain witnesses or testify himself.

The comments were neither unwitting nor unintentional. The prosecutor made the initial closing argument. He had ample opportunity to phrase his speech, and his choice of words was deliberate. He stood ready to meet respondents' objections, and with the district court's approval he stated four times that evidence was unchallenged.

The error was highly prejudicial. The government argues that the error was harmless beyond a reasonable doubt because the evidence was overwhelming (Pet. 13). Such has never been the standard. In Chapman v. California, the Court cautioned against the mere examination of the quantum of evidence. 386 U.S. 18, 23. In Harrington v. California, 395 U.S. 250, 254 (1969), the Court reaffirmed the Chapman standard and stated that error may be harmless if overwhelming untainted evidence supported the verdict.

The comments were prejudicial because they unfairly bolstered the credibility of the government witnesses. United States v. Rodriguez, 627 F.2d 110 (7th Cir. 1980). The comments essentially told the jury that the witnesses must have truthfully testified or else the respondents would have taken the stand to challenge the testimony. By improperly bolstering credibility,

the government tainted the evidence respecting the "unchallenged" aspects of the case. These aspects were crucial. Randy Newcomb, the government witness who was allegedly at the scene of the abduction, was unable to identify respondent during Newcomb's direct examination testimony, thereby weakening the in-court identifications made by the witnesses. Moreover, only the alleged victims testified respecting the sexual assaults and the interstate transportation involving respondent. Without this testimony, the government could not prove its case. Since the comments gave undue weight to the government's case, they were highly prejudicial, and the court of appeals could have easily reversed the convictions on this ground.

The government's contention that the magnitude of the crimes outweighs the need for reversal for repeated constitutional abuses is so totally contrary to law that further argument is unnecessary. Moreover, the government's pleas on behalf of those witnesses who must testify at the new trial should be rejected. Any necessary apologies to the witnesses must be made by the government. The prosecutor should have considered the potentially traumatic impact of the re-trial before he deliberately commented on respondent's failure to testify.

In the final analysis, the decision imposes absolutely no new burden on government attorneys, nor does it hamper in any way the effective prosecution of criminal actions. Within the boundaries of the Constitution, United States attorneys can be just

as forceful and inventive as always. By simply respecting a defendant's fifth amendment right to remain silent at trial, the government will avoid any adverse impact from the decision.

CONCLUSION

The petition should be denied.

Respectfully submitted,

PAUL VICTOR ESPOSITO
135 South La Salle Street
Suite 1000
Chicago, Illinois 60603
312-580-1250
Attorney of Record for
Respondent Gable Gibson

LEWIS, OVERBECK & FURMAN
135 South La Salle Street
Suite 1000
Chicago, Illinois 60603
312-580-1200
Of Counsel.

No. 81-1463

RECEIVED
MAR 8 1982
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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

KELVIN HASTING, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES respondent GABLE GIBSON, by his attorney, PAUL VICTOR ESPOSITO, and pursuant to United States Supreme Court Rule 46.1 respectfully requests this Honorable Court to allow him to proceed in forma pauperis in this case. In support of his motion respondent states that PAUL VICTOR ESPOSITO was appointed by the United States Court of Appeals for the Seventh Circuit pursuant to the Criminal Justice Act of 1964 to represent him during the appellate stages of this case.

GABLE GIBSON, by his attorney,
PAUL VICTOR ESPOSITO

Paul Victor Esposito

Paul Victor Esposito
135 South La Salle Street
Suite 1000
Chicago, Illinois 60603
312/580-1250

LEWIS, OVERBECK & FURMAN
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Of Counsel

No. 81-1463

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

KELVIN HASTINGS, ET AL.,

Respondents.

CERTIFICATE OF SERVICE

Paul Victor Esposito states that he is one of the counsel of record for respondent GABLE GIBSON, and is authorized to make the following certification:

Counsel is a member in good standing of the Bar of this Court;

That on March 5, 1982, counsel served a copy of Motion for Leave to Proceed In Forma Pauperis on each of the following counsel listed below by depositing the document in the United States Post Office Box at 135 South La Salle Street, Chicago, Illinois 60603, with first class postage prepaid, addressed to the following counsel at their respective post office addresses:

Rex E. Lee,
D. Lowell Jensen,
Harriet S. Shapiro,
John F. DePew,
Department of Justice
Washington, D.C. 20530

J. W. Lucco
Attorney at Law
224 St. Louis Avenue
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David E. Booth
Federal Public Defender
P. O. Box 2379
East St. Louis, Illinois 62200

Frederick J. Hess
Attorney at Law
23 South First Street
Belleville, Illinois 62220

William L. Gagen
Attorney at Law
118 South Charles Street
Belleville, Illinois 62220

Said document was served on the above named counsel pursuant to Supreme Court Rule ~~46.1.~~

Paul b. Yasinto

Appendix

JOHN H. OVERBECK, JR
JOHN M. TEEVAN
O. KEITH STOUTNER
PAUL L. FRETER
DAVID J. CREAGAN, JR
GEORGE W. PHILLIPS
TIM J. EMMITT
JOHN B. BURDICK, JR
JAMES R. GANNON
MICHAEL S. VIRGIL
LEONARD S. GOSLAWSKI
RONALD J. HOENIG
ROBERT A. BUBROWSKY
THOMAS N. WARNER
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JEROME T. BRENNAN (d 1972)

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Lit-1322

LODGING

RECEIVED
SEP 28 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

The Honorable Alexander L. Stevas
Clerk of the United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

Re: United States v. Kelving Hasting, et al.,
No. 81-1463

Dear Mr. Stevas:

Noted 9/28

I am one of the attorneys for Respondents in this matter.

Enclosed is a copy of the Petition for Rehearing filed by the United States in the United States Court of Appeals for the Seventh Circuit in the above-entitled cause.

The Brief for Respondents will make reference to the government's Petition for Rehearing. Accordingly, I respectfully request that the Petition be lodged with the Clerk's office in connection with the Supreme Court's consideration of this case.

If you have any questions regarding this matter, please feel free to contact me.

Very truly yours,

LEWIS, OVERBECK & FURMAN

Paul V. Esposito

PVE:co
Enclosure

cc: Honorable Rex E. Lee
Mr. William L. Gagen
Mr. J. William Lucco
Mr. Ariel Cueto
Mr. Robert C. Babione

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NOS. 80-1224, 80-1225, 80-1246,
80-1247 And 80-1398

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

KELVIN HASTINGS, GABLE GIBSON, NAPOLEON STEWART,
GREGORY LAMONT WILLIAMS and KEVIN WENDELL ANDERSON,
Defendants-Appellants.

Appeals From The United States District Court
For The Southern District Of Illinois
Honorable James L. Foreman, Chief Judge Presiding

PETITION FOR REHEARING

JAMES R. BURGESS, JR.
United States Attorney

MARSHA L. JOHNSON
Assistant United States Attorney

ATTORNEY FOR PLAINTIFF-APPELLEE

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NOS. 80-1224, 80-1225, 80-1246,
80-1247 And 80-1398

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

KELVIN HASTINGS, GABLE GIBSON, NAPOLEON STEWART,
GREGORY LAMONT WILLIAMS and KEVIN WENDELL ANDERSON,
Defendants-Appellants.

Appeals From The United States District Court
For The Southern District Of Illinois
Honorable James L. Foreman, Chief Judge Presiding

PETITION FOR REHEARING

ISSUES PRESENTED FOR REVIEW

I. Equivocal Interpretation Of Prosecution Remark.

II. Harmless Error.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NOS. 80-1224, 80-1225, 80-1246,
80-1247 And 80-1398

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	) Appeals from the United States District
	) Court for the Southern District of
vs.	) Illinois.
	)
KELVIN HASTINGS, GABLE GIBSON,	) Honorable James L. Foreman, Chief Judge
NAPOLEON STEWART, GREGORY LAMONT	) Presiding.
WILLIAMS and KEVIN WENDELL	)
ANDERSON,	) Criminal NO. 79-05041-E
	)
Defendants-Appellants.	)

PETITION FOR REHEARING

Comes now the petitioner, Plaintiff-Appellee, pursuant to Rule 40 of the Federal Rules of Appellate Procedure and petitions the panel for a Rehearing of its decision of September 22, 1981, which reversed and remanded the convictions of Defendants-Appellants on January 25, 1980.

In support of this Petition, petitioner respectfully submits that in reversing and remanding the convictions, the Court overlooked certain points of law which are crucial to the issue of prosecutorial misconduct raised on appeal.

I. EQUIVOCAL INTERPRETATION OF PROSECUTION REMARK

This Court held that the quoted remarks made by the prosecutor in his Final Argument were not subject to "equivocal interpretation", but were"pointed allusion[s]" to the fact that the defendants did not testify. In so holding, the Court stated that only testimony by the defendants could have "challenged"

the Government's evidence as to the rapes, the sodomies, the kidnapping, the transportation and the locations.

By this ruling, the Court overlooked the facts in applying the standard laid down in United States vs. Buege, 578 F.2d 187, 188 (7th Cir. 1978), that is, whether such statements are "manifestly intended to be or are of such a character that the jury will naturally and necessarily take them to be comment on the defendant's failure to testify."

It is significant that the prosecutor prefaced his remarks with this language: "Let's look at the evidence the defendants put on here for you so that we can put that in perspective . . . Defendants on cross-examination and - . . . But if they do put on a case, the Government can comment on it."(T.873-4). These prefatory remarks, when coupled with the very extensive cross-examination throughout the trial by defense counsel relating solely to identification and to events prior to and subsequent to the charged offense, as well as the defense case consisting of identifying characteristics, inconsistent statements, and pre-occurrence events, do not "naturally and necessarily" require a jury to believe the remaining comments were directed to the failure of the defendants to testify. Nor were such statements "manifestly intended to . . . or are of such a character" which would lead the jury to the same conclusion.

Even though the defendants were the only witnesses who could challenge the victims' testimony as to the sexual attacks, kidnapping and transportation, the remarks in issue were subject to equivocal interpretation by the jury. While the phrasing of the comments was, perhaps, inappropriate, the case taken as a whole, permits interpretation of the statements to be allowable comment on "the failure of the defense, as opposed to the defendant, to counter or explain the testimony presented . . .", thus, not being an infringement on the right not to testify. United States vs. Becker, 569 F.2d 951, 965 (5th Cir. 1978).

II. HARMLESS ERROR

This Court further held that the comments constituted plain error, requiring reversal and remand. By so holding, the Court overlooked the application of the harmless error doctrine on this constitutional issue laid down in Chapman vs. California, 386 U.S. 18 (1967).

Assuming the prosecutor's comments in final argument were arguably improper, the Court must determine whether or not the error was harmless beyond a reasonable doubt under Chapman vs. California, 386 U.S. 18, 24 (1967). This Court, in United States vs. Rodriguez, 627 F.2d 110, 113 (7th Cir. 1980), set forth the means of testing the harmlessness of the remark: "An arguably improper remark will require determination of its probable effect on the jury in combination with all the evidence presented. If the evidence of guilt is sufficient to find beyond a reasonable doubt that the error was harmless, reversal may not be required." Some factors to consider in applying this standard are: repetitive nature of the improper comments; strength of the evidence against the defendants; nature of the government's evidence, e.g., direct or circumstantial; existence of defense evidence disputing the commission of the offense; presence of curative instructions. See Harrington vs. California, 395 U.S. 250, 253-254 (1969); Fontaine vs. California, 390 U.S. 593 (1968); Chapman vs. California, 386 U.S. 18, 25-26 (1967); United States vs. Muscarella, 585 F.2d 242, 249 (7th Cir. 1978); United States vs. Buege, 578 F.2d 187 (7th Cir. 1978). See also United States vs. Boyd, 620 F.2d 129, 131 (6th Cir. 1980); Eberhardt vs. Bordenkircher, 605 F.2d 275, 278-280 (6th Cir. 1979).

Here, the questioned comments were not continuously repeated throughout the final arguments, but occurred in only one portion of the government's long closing argument. That was one small instant when considered in the context of the extremely lengthy final arguments made by all counsel in the case. (TR. 856-950). Further, three defense counsel pointed out the government's

burden of proof to the jury (TR. 876, 879, 911, 917, 929, 932). The government's case was strong, showing, as this Court said, "clear evidence of guilt", which was proved through eyewitness and direct evidence. The defense evidence presented was not such that disputed the commission of the offenses but rested upon the reliability of the victims' identification of the defendants. This Court upheld the reliability of the victims' in-court identifications and the jury found such testimony credible and believable by convicting the defendants of the offenses. Lastly, the trial court instructed the jury, on at least three occasions, that the burden of proof was on the government, that the presumption of innocence is with the defendants and that the defendant is not required to produce any evidence or prove his innocence. (TR. 956, 958, 960).

CONCLUSION

This Petition for Rehearing is respectfully submitted for the Court's consideration of certain facts and law it may have overlooked in its ruling in light of the contents and law cited in this Petition.

Respectfully Submitted,

JAMES R. BURGESS, JR.
United States Attorney

By MARSHA L. JOHNSON
Assistant United States Attorney

Form No. USA-20
(Rev. 10-9-58)

CERTIFICATE OF SERVICE BY MAIL

UNITED STATES OF AMERICA, Plaintiff-Appellee,)
vs.) NOS. 80-1224, 80-1225, 80-1246, 80-1247 And 80-1398
GABLE GIBSON, KELVIN HASTINGS, NAPOLEON STEWART, GREGORY LAMONT WILLIAMS and KEVIN WENDELL ANDERSON,)
Defendants-Appellants.

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the SOUTHERN District of ILLINOIS and is a person of such age and discretion as to be competent to serve papers.

That on 10-19-81 he served a copy of the attached

PETITION FOR REHEARING

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at 750 Missouri Avenue, East St. Louis, IL 62202

Addressee(s):

Frederick J. Hess
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23 South First Street
Belleville, IL 62220

William L. Gagen
Attorney at Law
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118 South Charles
Belleville, IL 62221

Steven E. Katzman
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David E. Booth
Federal Public Defender
P.O. Box 2379
East St. Louis, IL 62202

[illegible]

Joann Riccetto

Opposition

4

81-1463

NO.

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

KELVIN HASTINGS, et al.,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Telephone: 618/277-6646

Attorney for Napolean Stewart

QUESTION PRESENTED

I. Whether the Court of Appeals correctly reversed defendant's conviction, where the prosecutor, in closing argument, improperly referred to the failure of the defendants to testify in their own behalf.

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

KELVIN HASTINGS, et al.,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is reported at 660 F.2d 301 and is attached to the Government's Petition for Writ of Certiorari as Appendix A.

JURISDICTION

The Judgement of the Court of Appeals was entered on September 22, 1981. (App. B to the Government's Petition for Writ of Certiorari). The Government's Petition for Writ of Certiorari was filed February 3, 1982. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF FACTS

The Statement of Facts contained in the Government's Petition for Writ of Certiorari is adequate for an understanding of the issue presented and need not be repeated here.

REASON FOR DENYING THE PETITION

This is an argument that the Seventh Circuit can reverse under its supervisory powers without finding that the error was not harmless beyond a reasonable doubt. Petitioner does not seriously contend that the prosecuter's remarks or arguments to the jury in this case were not improper. Indeed, petitioner concedes that the prosecuter's remarks were "arguably improper" (Pet. p. 8). Although petitioner elsewhere suggests that the prosecutor's remarks did not constitute prohibited indirect comment on the respondent's failure to testify. (Pet. p. 12 n. 10), the Court of Appeals clearly perceived the remarks to be such indirect comment when it said, "It is difficult to imagine a more pointed allusion to the failure of the defendant to take the witness stand other than a direct reference to such failure. Equivocal interpretation is not possible" (Pet., App. A, p. 4a).

Respondent submits that petitioner's argument that the Court of Appeals refused to apply the harmless error doctrine misses the mark. The Court of Appeals carefully considered the evidence (Pet., App. A, p. 2a). Admittedly, the Court of Appeals stated that there was "clear evidence of guilt" (Pet., App. A, p. 5a). Further, the Court of Appeals did conclude that application of the harmless error doctrine "would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment

rights" (Pet., App. A, p. 5a). However, the fact that the Court refused to apply the harmless error doctrine in this case does not conclusively establish that the Court did not consider the prosecution's effect of the egregious remarks upon the jury.

However, respondent respectfully submits that the Court below expressly refused to adopt a per se rule of reversal in Rodriguez v. United States, 627 F.2d 11., 112-113 (7th Cir. 1980). The Court of Appeals citation of its decisions in United States v. Buege, 578 F.2d 187 (7th Cir.), cert. denied 439 U.S. 871 (1978), and Rodriguez, supra where the Court had carefully considered this question, clearly shows by implication that the Court, although acutely aware of the harmless error doctrine, nevertheless concluded, after having carefully reviewed the evidence, that the doctrine should not be applied here because the prosecutor's argument was so prejudicial that it could not have been harmless error beyond a reasonable doubt despite the Court's conclusion that the evidence of guilt was clear.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

AMIEL CUETO
Attorney at Law
2027 West Main Street
Belleville, Illinois 62221
Telephone: 618/277-6646

Attorney for Napoleon Stewart

MARCH 24, 1982

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1463

UNITED STATES OF AMERICA,

Petitioner,

v.

KELVIN HASTINGS, et al.,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NAPOLEON STEWART, one of the respondents herein, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provision of Title 28, United States Code, Section 1915, and Rule 46 of this Court, and to file herein his response to the petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by petitioner in single counterpart, without printing the same and without being required to submit the requisite forty copies. The typed brief of respondent is presented herewith for filing.

The Undersigned counsel has been appointed to represent respondent in the United States District Court for the Southern District of Illinois under the Criminal Justice Act of 1964 [18 U.S.C. Sec. 3006 A(d)(6)].

Respectfully submitted,

AMIEL CUETO
Attorney for Napoleon Stewart
2027 West Main Street
Belleville, Illinois 62221
618/277-6646

AFFIDAVIT OF SERVICE

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

I, AMIEL CUETO, depose and say that I am attorney of record for Napoleon Stewart, one of the respondents herein, and that on the 24th day of March, 1982, pursuant to Rule 28, Rules of the Supreme Court, I served a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis to the United States Court of Appeals in the Seventh Circuit on each of the parties required to be served herein as follows:

Honorable Rex E. Lee
Solicitor General,
Attorney for Petitioner
Department of Justice
Washington, D.C. 20530

Mr. William Haine
Attorney for Respondent Gibson
21 E. Acton
Wood River, Illinois 62095

Marsha L. Johnson
Assistant U.S. Attorney,
Attorney for Petitioner
Southern District of Illinois
750 Missouri Avenue
East St. Louis, IL 62201

Mr. William Gagen
Attorney for Respondent Williams
118 South Charles
Belleville, Illinois 62221

Mr. J. William Lucco
Attorney for Respondent Hastings
224 St. Louis
Edwardsville, IL 62025

Mr. William Booth
Federal Public Defender
Attorney for Respondent Anderson
P.O. Box 2379
East St. Louis, Illinois 62201

All parties required to be served have been served.

AMIEL CUETO

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 24th day of March, 1982.

NOTARY PUBLIC

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1463

UNITED STATES OF AMERICA,

v.

KELVIN HASTINGS, et al.,

AFFIDAVIT

I, AMIEL CUETO, do hereby depose and state that the following information is true and correct to the best of my knowledge and belief.

1. That I was appointed to represent Napoleon Stewart in cause no. 82-50001-01 on his re-trial in the United States District Court for the Southern District of Illinois.

2. That the Government has petitioned this Honorable Court for Certiori.

3. That Frederick Hess had represented Napoleon Stewart until the time of my appointment and that all pleadings and other documents related to this case had been sent to him.

4. That on February 23, 1982, I appeared for various motions before the Honorable William L. Beatty in the United States District Court for the Southern District of Illinois, at which time I was advised of the Government's Petition in this Court.

Amiel Cueto

AMIEL CUETO
Attorney for Napoleon Stewart
2027 West Main Street
Belleville, Illinois 62221
618/277-6646

AMIEL CUETO under oath states that he is the attorney for NAPOLEAN STEWART, AND THAT HE HAS READ THE FOREGOING Affidavit signed by him, and that the statements contained therein are true and correct to the best of his knowledge and belief.

Amiel Cueto
AMIEL CUETO

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 24th day of March, 1982.

Julie Rotterdam
NOTARY PUBLIC

AFFIDAVIT OF SERVICE

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

I, AMIEL CUETO, depose and say that I am attorney of record for Napoleon Stewart, one of the respondents herein, and that on the 24th day of March, 1982, pursuant to Rule 28, Rules of the Supreme Court, I served a copy of the foregoing Affidavit to the United States Court of Appeals in the Seventh Circuit on each of the parties required to be served herein as follows:

Honorable Rex E. Lee
Solicitor General,
Attorney for Petitioner
Department of Justice
Washington, D.C. 20530

Mr. William Haine
Attorney for Respondent Gibson
21 E. Acton
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Assistant U.S. Attorney,
Attorney for Petitioner
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Mr. William Gagen
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Mr. J. William Lucco
Attorney for Respondent Hastings
224 St. Louis
Edwardsville, Illinois 62025

Mr. William Booth
Federal Public defender
Attorney for REspondent Anderson
P.O. Box 2379
East St. Louis, Illinois 62201

All parties required to be served have been served.

Amiel Cueto
AMIEL CUETO

SUBSCRIBED AND SWORN to before me, a Notary Public, this 24th day of March, 1982.

Julie Rotterdam
NOTARY PUBLIC

Opposition

5

81-1463

No.

Office - Supreme Court, U.S.
FILED
MAR 5 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Petitioner,

v.

GREGORY WILLIAMS, *et al.*,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

I. Whether the Court of Appeals correctly reversed defendant's conviction, where the prosecutor, in closing argument, improperly referred to the failure of the defendants to testify in their own behalf.

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United States v. Rodriquez, 627 F. 2d 110 (7th Cir. 1980)	3

No.

IN THE

Supreme Court of the United States

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UNITED STATES OF AMERICA,
Petitioner,

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GREGORY WILLIAMS, *et al.*,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is reporteed at 660 F. 2d. 301 and is attached to the Government's Petition for Writ of Certiorari as Appendix A.

JURISDICTION

The Judge of the Court of Appeals was entered on September 22, 1981. (App. B to the Government's Petition for Writ of Certiorari). The Government's Petition for Writ of Certiorari was filed February 3, 1982. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF FACTS

The Statement of Facts contained in the Government's Petition for Writ of Certiorari will not be repeated here. There are however, certain misstatements of the facts contained in the Government's petition.

In a footnote attempting to explain the activities of the male companion of the three girls who were the alleged victims in this case, the Government states that Randy Newcomb "flagged down a passing motorist, and summoned the police." (Petition, p. 3 n. 1) In fact, Randy Newcomb hitchhiked home, went to work, and came to the police station only after the police threatened to send a squad car to pick him up. (Tr. 722, 723, 746)

The Government states in its Petition that there was a clear identification of all the defendants by all the victims. It is interesting to note that the three victims viewed a number of line-ups after the alleged offense. Only the defendant Williams requested that an attorney be present during the line-up. Defendant Williams was the *only* defendant *not* positively identified by any of the victims. (Supp. Hearing 97, 98)

The primary defense theory was not solely to suggest mis-identification as the Government argues, but rather that in addition to the mis-identifications, the victims were not telling the truth concerning the portion of this incident occurring in East St. Louis, Illinois. Defendants raised the possibility that the girls may have gone with the defendants voluntarily and that any rape, if it occurred, occurred solely in the State of Missouri. Supporting this position are Randy Newcomb's behavior (Tr. 722, 723, 746); The girls, allegedly on their way to purchase gas, drove past at least one open gas station that was well lit and easily visible from the roadway. (Tr. 724-728); The Clark Service Station where the girls stopped did not sell gas or oil at the time of the morning when the girls were present. (Tr. 752); There was some conversation between the girls and some men in a blue Cadillac at the service station (Tr. 755-756) and there was no collision damage to the victims' car (Tr. 746).

REASON FOR DENYING THE PETITION

The decision of the Court of Appeals must be viewed in light of a long line of recent cases decided by that Court. These opinions, particularly *United States* v. *Rodriquez*, 627 F. 2d 110 (7th Cir. 1980) and *United States* v. *Buege*, 578 F. 2d 187 (7th Cir.), Cert. denied, 439 U.S. 871 (1978) make it apparent that the Court of Appeals for the Seventh Circuit has been attempting to prevent prosecutors from making the kind of comments which were made in this case. The opening sentence of the *Rodriquez* opinion (*Supra*) probably summarizes the frustration that the Court of Appeals has experienced. The opening sentence is, "A federal prosecutor in final argument has done it again." Viewed in light of the above cases, it is clear that the ruling of the Court of Appeals for the Seventh Circuit is not nearly so unreasonable as the Government suggests. The case is merely one further attempt by the Court of Appeals to prevent prosecutors from making the kind of remarks made by the prosecutor in this case.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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MARCH 4, 1982

No. 81-1463

RECEIVED
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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

GREGORY LAMONT WILLIAMS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW respondent GREGORY LAMONT WILLIAMS, by and through his attorney, WILLIAM L. GAGEN, and pursuant to United States Supreme Court Rule 46.1 respectfully requests this Honorable Court to allow him to proceed in forma pauperis in this case. In support of his motion respondent states that WILLIAM L. GAGEN was appointed by the Untied States Court of Appeals for the Seventh Circuit and by the United States District Court for the Southern District of Illinois pursuant to the Criminal Justice Act of 1964 to represent him during the appellate stages of this case.

GREGORY LAMONT WILLIAMS, by his attorney, WILLIAM L. GAGEN

WILLIAM L. GAGEN

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Petitioner's Brief

Office - Supreme Court, U.S.
FILED
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No. 81-1463

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

KELVIN HASTING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether closing argument by the prosecutor that constitutes improper comment upon the defendants' failure to testify justifies reversal of their convictions even though the error is harmless.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 660 F.2d 301.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a-7a) was entered on September 22, 1981. A petition for rehearing was denied on November 20, 1981 (Pet. App. 8a). On January 11, 1982, Justice Stevens extended the time to petition for a writ of certiorari to and including February 4, 1982. The petition was filed on February 3, 1982, and granted

[1] Additional assignments of error by respondents were rejected in an unpublished opinion filed simultaneously (81-6373 Cross-Pet. App. A1-A6).

on May 17, 1982 (J.A. 25).[2] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself.

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Fed. R. Crim. P. 52(a) provides:

> (a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, respondents were convicted of kidnaping, in violation of 18 U.S.C. 1201, interstate transportation of a female for immoral purposes, in violation of 18 U.S.C. 2421, and conspiracy, in violation of 18 U.S.C. 371. Respondents Hasting, Stewart and Williams were sentenced

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[2] Cross petitions filed by respondents Hasting (No. 81-6379), Williams (No. 81-6373), and Gibson (No. 81-6344) were denied on May 17, 1982.

to concurrent terms of 50 years' imprisonment on the kidnaping count and five years' imprisonment on the interstate transportation and conspiracy counts. Respondents Gibson and Anderson were sentenced to concurrent terms of 40 years' imprisonment on the kidnaping count and five years' imprisonment on the interstate transportation and conspiracy counts (J.A. 8-9; Tr. 1000-1001, 1012). The court of appeals reversed the convictions (Pet. App. 1a-5a).

1. The evidence at trial showed that during the early morning of October 11, 1979, three teenage girls, Marianne Long, Carma Starnes, and Tammy Warren, were riding in an automobile in the vicinity of East St. Louis, Illinois, with Randy Newcomb. A turquoise Cadillac occupied by respondents bumped the girls' vehicle, forcing it to pull off the highway and stop. Brandishing what appeared to be a handgun, respondent Williams approached the vehicle and directed its occupants to "open the door or else I'm going to shoot" (Tr. 113-115, 283-298, 412-414). Respondent Stewart, who had joined Williams, reached into the car and unlocked the door. Williams and respondent Anderson then pulled Starnes out by the hair, and Anderson choked her (Tr. 115-117, 295-298, 515). Stewart went to the other side of the car and threatened to kill Long if she did not unlock her door. After Williams, who had entered the vehicle to remove money from the girls' purses, unlatched the door, Stewart dragged Long out (Tr. 118). Next Williams picked up a brick and told Warren that if she did not open her door he would smash the window. When she opened the door, he pulled her from the vehicle and repeatedly struck her in the face with the brick (Tr. 120, 301, 416).

After the girls had been removed from their automobile, Long was placed upon its hood, where Stew-

art and respondent Gibson raped her and forced her to perform acts of sodomy (Tr. 119, 120, 416, 515). Respondents then forced all the girls into the Cadillac, which Stewart drove to St. Louis, Missouri (Tr. 123-124, 305-306).[3] En route, Stewart forced Long to commit acts of sodomy, while Williams raped her. While Hasting held a weapon to Starnes' side, Anderson forced her to sodomize him (Tr. 124-125, 310). When Warren refused the orders of respondents Hasting and Gibson to sodomize them, they repeatedly struck her (Tr. 419).

In St. Louis, the girls were taken to a vacant garage and dragged from the Cadillac (Tr. 129, 313). There Stewart raped Long again, Hasting and Gibson raped Warren and forced her to sodomize them, and Anderson raped Starnes after Williams choked her (Tr. 128-129, 312-313, 418-419).[4]

After the girls were detained at the garage for approximately 25 minutes, Williams and Stewart

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[3] Respondents ordered Newcomb to remove his clothing and go behind a nearby building. After respondents left, he returned and flagged down a passing motorist, who agreed to summon the police. Newcomb then hitchhiked home and reported the incident to the local police the following morning (Tr. 514-519).

[4] The owner of the garage, who entered the darkened premises during these events, observed four black men and two women, at least one of whom was white. One of the men was holding one of the women while another man raped her (Tr. 586-587). One of the men matched Anderson's description. When the garage owner asked what was going on, Stewart responded "[i]t's okay, we're just taking care of business" (Tr. 132, 315). Several other respondents replied that they were "having fun," and the owner told them to "pick some place somewhere else to have fun" (Tr. 597). He did not call the police, although he realized that he had witnessed a rape (Tr. 594, 587).

forced Long and Starnes back into the Cadillac and took them to Stewart's apartment, where they took turns raping and sodomizing them (Tr. 133-138, 319-323).[5] Hasting, Gibson and Anderson forced Warren into a different vehicle and took her to another garage, where they again raped her and compelled her to perform acts of sodomy (Tr. 421-423). After Anderson and Gibson left, Warren begged Hasting to release her. He responded "[n]ot yet," and continued his sexual assaults (Tr. 423).

Stewart, Williams and Hasting finally released the girls, who notified the police. Using a description of the scene of the rapes that the girls furnished, the police located Stewart's apartment, arrested him, and found items of the girls' clothing and personal papers belonging to Long (Tr. 138-142, 324-327, 631-638). They also located the turquoise Cadillac in which the girls had been abducted, determined that it was registered to Williams, and found Williams' fingerprints on the girls' car (Tr. 662, 672-673). Following the arrest of the other respondents, one or more of the girls identified each respondent during police lineups (Pet. App. 2a).[6]

2. Respondents' cross-examination of the prosecuting witnesses focused primarily upon their activities on the night of October 10-11 prior to the time their car was stopped, and upon their identification of respondents following their arrests. In particular, the victims admitted that their late night activities vio-

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[5] Stewart's mother testified that her son and Williams arrived at the house about 5:30 in the morning with two white girls and stayed about half an hour (Tr. 608-612).

[6] Respondent Williams asserts (Br. in Opp. 2) that he was not identified by any of the victims in pretrial lineups. But see Tr. 345-347; Pet. App. 2a; 81-6373 Cross-Pet. App. 3a.

lated parentally-imposed curfews, that prior to their encounter with respondents they had been drinking at two different locations, and that they had become lost after leaving a tavern. When their car ran out of oil, they stopped at a filling station, where they observed an automobile similar to respondents' turquoise Cadillac. *E.g.*, Tr. 169-178, 204-211, 351-364, 462-464.

Respondents did not testify in their own behalf. The primary defense theory was to suggest the possibility of mistaken identity by presenting evidence that some of respondents' hair styles immediately before and after the incident differed from the victims' descriptions of their assailants' appearances.[7] Additionally, they presented testimony that, shortly before the assaults, the occupants of the victims' car conversed with four black males in a turqouise Cadillac (Tr. 752-756), that Long, who owned the victims' car, had been too intoxicated to drive (Tr. 743), that Randy Newcomb had been reluctant to report the incident to the police (Tr. 731-733), and that, following Anderson's arrest, Warren and Long were unable to identify him in a lineup (Tr. 770).

3. During his summation, the prosecutor discussed the government's evidence. He then turned to the defendants' case and stated (J.A. 21-22):

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[7] For example, while the victims testified that Williams was wearing a goatee, his mother testified that his facial hair at that time consisted only of a moustache. Similarly, while the victims testified that Anderson was wearing his hair in an Afro, friends and relatives testified that on the evening before and the morning after the incident he was wearing it in "french braids" (Tr. 749, 789, 795, 798, 805). And, while Hasting was described as having a moustache (Tr. 749), his mother testified that on the night of the assaults he had no facial hair (Tr. 811-812).

MR. HURSEY [prosecutor]: * * * Let's look at the evidence the defendant put on here for you so that we can put that in perspective. I'm going to tell you what the defendant did not do. Defendants on cross-examination and—

MR. BOOTH [defense counsel]: I'll object to that, Your Honor. You're going to instruct to the contrary on that and the defendants don't have to put on any evidence.

MR. HURSEY: That's correct, Your Honor.

THE COURT: That's right, they don't. They don't have to.

MR. HURSEY: But if they do put on a case, the Government can comment on it. The defendants at no time ever challenged any of the rapes whether or not that occurred, any of the sodomies. They didn't challenge the kidnapping, the fact that the girls were in East St. Louis and they were taken across to St. Louis. They never challenged the transportation of the victims from East St. Louis, Illinois to St. Louis, Missouri, and they never challenged the location or whereabouts of the defendants at all the relevant times. They want you to focus your attention on all of the events that were before all of the crucial events of that evening. They want to pull your focus away from the beginning of the incident in East St. Louis after they were bumped, and then the proceeding events. They want you to focus to the events prior to that. And you can use your common sense and still see what that tells you. So, in conclusion, I'd just like to speak very plainly. All your job is as a juror is to look at the evidence as a whole. That's all the people of the United States want you to do is look at the evidence as a whole, as its been presented. And what will the evidence show if you look at it as a whole? It will show that the

> five defendants that I have alluded to during this half hour, went on a rampage of violence, sex and intimidation * * *.

Following this argument, respondents moved for a mistrial, claiming that the prosecutor's argument constituted an improper comment upon their failure to testify. The district court concluded that the comments were "in the context of maybe commenting on what evidence had been presented, maybe not being directed particularly to the real issues involved * * * there has been that involved in the case" (J.A. 24). Accordingly, the mistrial motion was denied (J.A. 23-24).

4. On appeal, the court of appeals reversed respondents' convictions because of the prosecutor's closing argument. It relied upon this Court's decision in *Griffin* v. *California*, 380 U.S. 609 (1965), and its own prior decision in *United States* v. *Buege*, 578 F.2d 187, 188 (7th Cir.), cert. denied, 439 U.S. 871 (1978), in which it had stated (citations omitted):

> Direct reference by a prosecutor to a defendant's election not to testify at trial is clearly proscribed. Indirect comments such as the prosecutor's references in this case to "uncontradicted testimony" constitute error when the statements are "manifestly intended to be or [are] of such a character that the jury [will] naturally and necessarily take [them] to be comment on the defendant's failure to testify." This court has previously held that when a prosecutor refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony, such reference necessarily focuses the jury's attention on

the defendant's failure to testify and constitutes error.

Applying this reasoning to the facts of this case, the court asserted that only respondents could have disputed the testimony of the victims implicating them in the sexual assaults and concluded: "It is difficult to imagine a more pointed allusion to the failure of the defendants to take the witness stand other than a direct reference to such failure. Equivocal interpretation is not possible." (Pet. App. 4a).

The court declined to assess whether, in view of the weight of the evidence, there was any reasonable possibility that the prosecutor's remarks might have contributed to the conviction. Noting, as stated in *United States* v. *Rodriguez*, 627 F.2d 110, 113 (7th Cir. 1980), that "'[t]he remarks, harmless or not, * * * simply should not occur'" because of their asserted infringement upon fundamental constitutional protections, the court held that "[d]espite the magnitude of the crimes committed and the clear evidence of guilt, an application of the doctrine of harmless error would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights" (Pet. App. 5a). The government's petition for rehearing, calling the court's attention to the apparent inconsistency between its holding and the holding of this Court in *Chapman* v. *California*, 386 U.S. 18 (1967), was denied without comment (Pet. App. 8a).

SUMMARY OF ARGUMENT

The refusal of the court below to apply the harmless error doctrine to what it found was an improper reference by the prosecutor to respondents' failure to testify is squarely inconsistent with this Court's de-

cision in *Chapman* v. *California*, 386 U.S. 18 (1967), which rejected the argument that such remarks require automatic reversal without regard to whether they prejudice the substantial rights of a defendant at trial. That refusal is, moreover, violative of the requirement imposed by Congress upon both this Court and the courts of appeals that errors that do not affect the substantial rights of a defendant shall not constitute grounds for reversal of his conviction (28 U.S.C. 2111; see Fed. R. Crim. P. 52(a)).

The court of appeals did not purport to rest its decision upon its supervisory powers over proceedings in the lower courts, nor, contrary to respondents' suggestion, could it properly have done so. To begin with, the supervisory power of the federal courts does not extend to actions in conflict with statutes or rules, as the action of the court of appeals in this case was. Secondly, even if the supervisory power embraced the authority to reverse convictions for harmless errors in some cases, this would be an entirely inappropriate occasion to exercise such power. In general, prosecutorial misconduct, if deliberate or recurring, can be and is dealt with through administrative and judicial disciplinary measures. Here, any overstepping of the bounds of proper comment was minor at worst and could not reasonably be characterized as knowing or deliberate. Under the circumstances, it was inappropriate to compel the government and the victims of this heinous crime to undergo the ordeal of another lengthy trial, in the face of convincing evidence of respondents' guilt and the lack of any substantial possibility that the prosecutor's remarks had any improper effect on the jury's verdicts.

ARGUMENT

I

I. THE COURT OF APPEALS IMPROPERLY FAILED TO APPLY THE HARMLESS ERROR DOCTRINE WHEN IT CONCLUDED THAT THE PROSECUTOR'S COMMENT CONCERNING THE DEFENSE CASE WAS PER SE REVERSIBLE ERROR

a. In *Chapman* v. *California*, 386 U.S. 18 (1967), both the court's instructions to the jury and the prosecutor's closing argument, relying on a provision of the California Constitution that permitted comment upon a defendant's failure to testify, had repeatedly alluded to the defendants' silence and their failure to testify concerning events within their knowledge. *Id.* at 19, 25, 26-42. Shortly after the trial, this Court held in *Griffin* v. *California*, 380 U.S. 609 (1965), that the state constitutional provision was an impermissible infringement upon the Fifth Amendment privilege against compelled self-incrimination. After granting review in *Chapman*, this Court considered the contention that constitutional errors in general—and *Griffin* violations in particular—should always require reversal without regard to prejudice. While the Court emphasized (386 U.S. at 23) that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error," it evidently did not believe that references to the defendant's failure to testify are in that category (386 U.S. at 21-24). Instead, relying on the standard articulated in *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), the Court held that, where a court is able to determine beyond a reasonable doubt that such an

argument did not contribute to the verdict, reversal is inappropriate (386 U.S. at 24).[8]

Since *Chapman*, this Court has consistently refused to reverse state and federal convictions for constitutional errors which it deemed harmless. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (Fourth Amendment); *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (Sixth Amendment); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (same); *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972) (same); *Harrington* v. *California*, 395 U.S. 250 (1969) (same). In other cases where it has found errors of a constitutional magnitude, the Court has often remanded the case for a determination whether the error was harmless. See, *e.g.*, *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (Sixth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1, 11 (1970) (same); *United States* v. *Wade*, 388 U.S. 218, 242 (1967) (same).

While this Court has had no occasion to affirm a conviction despite a *Griffin* violation, its two post-*Chapman* reversals were rendered only upon a finding of potential prejudice to the defendant from the prosecutor's improper comments. In *Anderson* v. *Nelson*, 390 U.S. 523 (1968), this Court concluded "that comment on a defendant's failure to testify cannot be labeled harmless error in a case where such com-

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[8] Applying this harmless error standard to the facts of *Chapman*, the Court concluded that the prosecutor's repeated and direct references to the defendants' silence virtually caused them to become witnesses against themselves; moreover, the evidence was sufficiently inconclusive that, absent the remarks, the jury might have refused to convict. Accordingly, the error was not harmless in the particular context of *Chapman*, and reversal of the convictions was required (386 U.S. at 26).

ment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal." *Id.* at 523-524. See also *Fontaine* v. *California*, 390 U.S. 593 (1968).

Prior to the instant case, the courts of appeals have generally recognized their duty to determine whether *Griffin* violations are harmless. Applying the *Chapman* standard in *United States* v. *Passaro*, 624 F.2d 938, 944-945 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981), the court affirmed the conviction because the prosecutor's reference to the defendant's silence was isolated, was not linked to a conclusion of guilt, and the defendant's guilt was clear. And in *Berryman* v. *Colbert*, 538 F.2d 1247, 1251 (6th Cir. 1976), after finding the prosecutor's summation "to be a square violation of *Griffin* v. *California*," the court analyzed each of the counts on which the defendant had been convicted from the perspective of the constitutional harmless error rule. Because the evidence relating to a conspiracy count was "overwhelming and undisputed," it concluded that the prosecutor's improper comment could not have contributed to the verdict and thus was harmless beyond a reasonable doubt; but because the evidence relating to the murder count was weak, reversal on that count was required. Accord, *e.g.*, *United States* v. *Armstrong*, 654 F.2d 1328, 1336 (9th Cir. 1981), cert. denied, No. 81-5932 (Jan. 25, 1982); *United States* v. *Sanders*, 547 F.2d 1037, 1042 (8th Cir. 1976), cert. denied, 431 U.S. 956 (1977); *Coleman* v. *United States*, 420 F.2d 616, 625 (D.C. Cir. 1969); *United States ex rel. Satz* v. *Mancusi*, 414 F.2d 90, 92 (2d Cir. 1969); *United States* v. *Edwards*, 576 F.2d 1152, 1154-1155 (5th

Cir. 1978). See also cases collected in Annot., 24 A.L.R. 3d 1093 (1979).[9]

b. The holding of the court below—that the harmless error doctrine is inapplicable to errors resulting from references by the prosecutor during argument to the defendant's failure to testify—is not only

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[9] Prior to its decision in the instant case, the Seventh Circuit had also held that the constitutional harmless error doctrine applies to comments by the prosecutor on the defendant's silence. Thus, in *United States* v. *Buege, supra,* it held that such a remark "requir[es] a determination of its probable effect on the jury in combination with all the evidence presented. When sufficient evidence exists so that the trial judge can declare beyond a reasonable doubt that the error was harmless, such error does not require reversal." 578 F.2d at 189, citing *Chapman* v. *California, supra.* See also *United States* v. *Rodriquez,* 627 F.2d 110, 113 (7th Cir. 1980); *United States* v. *Muscarella,* 585 F.2d 242, 250 (7th Cir. 1978).

In *United States* v. *Flannery,* 451 F.2d 880 (1st Cir. 1971), the court stated that, in cases tried after the date of its opinion in which the prosecutor's remarks clearly refer to the defendant's failure to testify, it "shall not endeavor to weigh prejudice but shall rule it prejudicial as [a] matter of law" (*id.* at 882). The court qualified this assertion, however, by stating that it would nonetheless continue to assess for prejudice when the improper comment is immediately followed by an instruction that the defendant has a constitutional right not to testify and that the comment constitutes prosecutorial misconduct. The court announced this intention without reference to *Chapman* or the harmless error statute and rule, and we of course believe the approach announced in *Flannery* is no more justified than that taken by the court below in the instant case. We note that following *Flannery* the First Circuit has never reversed a conviction for such a comment in the absence of a finding of prejudice. See, *e.g., United States* v. *Farnkoff,* 535 F.2d 661 (1st Cir. 1976); *United States* v. *Savarese,* 649 F.2d 83, 86-87 (1st Cir. 1981); *United States* v. *Flaherty,* 668 F.2d 566, 592-594 (1st Cir. 1981).

squarely at odds with the decisions of this Court and the courts of appeals that have uniformly undertaken harmless error inquiry in such cases, it also violates broader mandates of this Court and of Congress that govern the fashioning of remedies in criminal cases by appellate courts.

In *United States* v. *Morrison*, 449 U.S. 361 (1981), the court of appeals, without any showing of prejudice, had reversed the defendant's conviction and dismissed the indictment on the ground that her Sixth Amendment right to counsel had been violated as the result of efforts by government agents to disparage her attorney's representation. This Court reversed, holding that, as the alleged Sixth Amendment violation had no adverse impact upon the criminal proceedings, the remedy fashioned by the court of appeals was wholly unwarranted. 449 U.S. at 367. In particular, the Court emphasized "the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. * * * Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances" (*id.* at 364-365). The principle of tailoring the remedy to the injury resulting from the violation, the Court added, is applicable not only in the Sixth Amendment context but in cases involving Fourth and Fifth Amendment violations as well. 449 U.S. at 365-366 n.3. See *United States* v. *Blue*, 384 U.S. 251, 255 (1966); *Stone* v. *Powell*, 428 U.S. 465, 490, 495 (1976).

More important, the harmless error rule is not simply a principle of judicial restraint. Congress has specifically precluded the appellate courts from disturbing a judgment of conviction where there is no genuine likelihood that alleged errors have prejudiced

the defendant's trial rights. Thus, 28 U.S.C. 2111 directs this Court and the courts of appeals to "give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties." [10] Similarly, Fed. R. Crim. P. 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Cf. Fed. R. Civ. P. 61.

Thus, assuming arguendo that the prosecutor's remarks constituted prohibited comment on the respondents' failure to testify, the court below was obliged by statute and binding precedent to consider whether the error was harmless beyond a reasonable doubt, and it was at liberty to reverse the conviction only if it concluded that there was a reasonable likelihood that the improper aspect of the argument affected the jury's verdict. In the absence of any such evaluation (particularly where, as the court of appeals recognized (Pet. App. 5a), the evidence of guilt was clear), "[t]he disparity * * * between the error committed by the [prosecutor] and the windfall afforded a guilty defendant by application of the [automatic reversal] rule is contrary to the idea of proportionality that is essential to the concept of justice." *Stone* v. *Powell*, *supra*, 428 U.S. at 490.

c. The court of appeals rested its decision in the instant case upon a perceived need to protect a constitutional right it believed to have been infringed. It did not purport to invoke its supervisory authority. Respondents nonetheless urge that reversal of their convictions was a proper exercise of such au-

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[10] Section 2111 was designed to incorporate the harmless error provisions formerly contained in Section 269 of the Judicial Code (28 U.S.C.), and to assure that the doctrine applies to all federal courts. H.R. Rep. No. 352, 81st Cong., 1st Sess. 18 (1949).

thority. See Gibson Br. in Opp. 6; Hasting Br. in Opp. 1; Stewart Br. in Opp. 2; Anderson Br. in Opp. 3. This contention is entirely without merit. Adoption of an automatic reversal rule in cases where the prosecutor improperly comments upon the defendant's failure to testify would be an abuse of the courts' supervisory power.

To begin with, the supervisory power of the courts may be exercised only in the absence of applicable legislation. See, *e.g.*, *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959); *Wolfle* v. *United States*, 291 U.S. 7, 13 (1934); *Funk* v. *United States*, 290 U.S. 371, 382 (1933). Cf. *United States* v. *Payner*, 447 U.S. 727 (1980). A supervisory rule requiring automatic reversal of a conviction whenever a prosecutor comments upon a defendant's failure to testify, without regard to whether the comment could have affected the substantial rights of the defendant, would be in square conflict with the mandate of 28 U.S.C. 2111, which requires that harmless errors be disregarded. Therefore, such an exercise of the supervisory power would "confer on the judiciary discriminatory power to disregard the considered limitations of the law it is charged with enforcing." 447 U.S. at 737.[11]

Even if this obstacle to the availability of supervisory power to reverse for harmless error could be overcome, the instant case would be wholly inappropriate for exercise of such power. Certainly its exercise could not be justified by a need to curb deliberate misconduct. The kind of error involved here

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[11] Of course, the statute would not have to be enforced if it were unconstitutional as applied to a particular kind of error or a particular case. A finding of unconstitutionality as applied to the type of error in this case is foreclosed by *Chapman*.

is often far from obvious, so that the determination that there has been a prohibited indirect comment on a defendant's failure to testify is more likely to mean that the prosecutor has crossed a rather indistinct line than that he has engaged in deliberate or knowing overreaching. See, *e.g.*, *United States* v. *Sanders*, *supra*, 547 F.2d at 1042-1043 (suggesting that argument that evidence is "undisputed" or "not contradicted" is ordinarily permissible, but that it is improper to argue that it is "undenied"); cf. *United States* v. *Savarese*, *supra*, 649 F.2d at 86-87.[12]

The test for determining whether a prosecutor's comment concerning the defense case violates the strictures of *Griffin* v. *California*, *supra*, is whether the remark was manifestly intended to be, or was of such a character that the jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify. *E.g.*, *United States* v. *Caicedo-Asprilla*, 632 F.2d 1161, 1170 (5th Cir. 1980). In determining the propriety of statements such as "the evidence is uncontroverted," or other remarks that can be construed to refer to a defendant's failure to testify, the court must evaluate factors such as the posture of the evidence in the particular case (*United States* v. *Sanders*, *supra*, 547 F.2d at 1042), the context in which the remark is made (*Lockett* v. *Ohio*, 438 U.S. 586, 595 (1978); *United States* v.

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[12] As Justice Marshall noted in dissent in *United States* v. *Payner*, *supra*, 447 U.S. at 746: "In large part when supervisory powers have been invoked the Court has been faced with intentional illegal conduct. It has not been the case that '[t]he criminal is to go free because the constable has blundered.' In these cases there has been no 'blunder' by the Government agent at all; rather, the agent has intentionally violated the law for the explicit purpose of obtaining the [advantage] in question" (citations omitted).

Caicedo-Asprilla, supra, 632 F.2d at 1170), the theory advanced by the defense (*Frank* v. *Blackburn*, 605 F.2d 910, 914 (1979), aff'd en banc, 610 F.2d 383 (5th Cir. 1980)), and the defense counsel's antecedent argument (*United States* v. *Hephner*, 410 F.2d 930, 935 (7th Cir. 1969)). It is not surprising that the results of this evaluation will vary from court to court.[13] These variable and often highly subjective factors increase the risk that a blanket rule requiring reversal in all cases where the court of appeals ultimately concludes that the prosecutor's closing argument contained a prohibited comment will chill entirely proper argument designed to emphasize the strength of the government's case.[14]

Even where it is reasonably clear that a prosecutor's argument constitutes an intentional comment upon the defendant's failure to testify or is part of a continuing practice by a particular prosecutor, the initiation of disciplinary action against the offending prosecutor is a more appropriate response than subjecting the criminal justice system and the victims

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[13] For example, in this case the trial judge concluded that the prosecutor had not referred to respondents' failure to testify (J.A. 24), while the court of appeals found it "difficult to imagine a more pointed allusion" to respondents' silence (Pet. App. 4a).

[14] Even where courts have held that, under the facts of a particular case, a prosecutor's argument could reasonably have been understood to be a reference to the defendant's failure to testify, they have often found that the improper reference was wholly unintentional, or that the remark was likely to have been intended for a proper purpose. See, *e.g.*, *United States* v. *Chandler*, 586 F.2d 593, 603-605 (5th Cir. 1978); *United States* v. *MacDonald*, 455 F.2d 1259, 1262 (1st Cir.), cert. denied, 406 U.S. 962 (1972); *Samuels* v. *United States*, 398 F.2d 964, 968 (5th Cir. 1968).

of the crime to the burden of a retrial when the error does not infect the jury's verdict. Cf. *United States* v. *Payner*, *supra*, 447 U.S. at 734 n.6; *Hampton* v. *United States*, 425 U.S. 484, 490-491 (1976) (opinion of Rehnquist, J.) (proper remedy for misconduct by law enforcement authorities lies in disciplinary action, not in freeing culpable defendants).

The Department of Justice has established procedures for investigating and punishing misconduct by federal prosecutors. Regulations that govern the conduct of Department of Justice personnel, including United States Attorneys and their assistants, specifically provide that "attorneys employed by the Department should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association" [15] and that "[a]ny violation of any provision [governing the conduct of Department of Justice employees] shall make the employee involved subject to appropriate disciplinary action." 28 C.F.R. 45.735-1(b), (c). Department regulations establish penalties for the violation of rules governing official conduct that range in severity from an official reprimand for a first offense for minor misconduct, to removal from office for the most serious offenses and repeated acts of misconduct. See U.S. Dep't of Justice, DOJ Order 1725.1A, *Discipline and Adverse Actions*, ch. 2 & App. 1 (Apr. 27, 1981). The Attorney General has established an Office of Profes-

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[15] ABA Model Code of Professional Responsibility DR7-106(C) (1980) provides that:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> * * * * *
>
> (7) Intentionally or habitually violate any established rule of procedure or of evidence.

sional Responsibility for the purpose of investigating allegations of unethical conduct by Department attorneys and other personnel. It is the task of the Office of Professional Responsibility to receive and investigate such charges, to recommend whether disciplinary action is appropriate, and to notify the person who made the allegations of the final result of the process. See 28 C.F.R. 0.39a.[16]

Thus, in cases where a trial or appellate court believes that a prosecutor's closing argument constitutes an intentional transgression of constitutional prohibitions against commenting upon the defendant's failure to testify, but also concludes there is no reasonable likelihood that the remarks affected the defendant's trial, the proper course is the initiation of a complaint for investigation by the Office of Professional Responsibility, and the imposition of appropriate disciplinary measures under Department of Justice regulations if the investigation reveals that such action is warranted.[17]

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[16] During 1980, the Office of Professional Responsibility investigated 28 complaints of unethical conduct initiated by "miscellaneous sources", including United States District Court Judges. See Office of Professional Responsibility, [1980] *Ann. Rep. to the Att'y Gen.* 3. See also, [1979] *Ann. Rep. to the Att'y Gen.* 9; [1976] *Ann. Rep. to the Att'y Gen.* 2-3 (summarizing examples of allegations involving unethical conduct by Department of Justice attorneys which the Office investigated). Within the past six months the Office has conducted an investigation of allegations that an Assistant United States Attorney made improper arguments to a grand jury. The investigation was terminated when the attorney resigned from the Department of Justice.

[17] Alternatively, the district courts can take direct disciplinary action against the offending attorney under local rules. See, *e.g.*, S.D. Ill. R. 33 (Rules of Disciplinary Enforcement).

Finally, the vicious nature of the crimes of which respondents were convicted, and the extraordinary ordeal for the victims of testifying to the events, render this an especially inappropriate vehicle for reversal for harmless error. Any didactic benefits inhering in such action must be outweighed here by the costs to innocent victims of crime and to the public perception of the manner in which federal criminal justice is administered.

II. THERE IS NO REASONABLE LIKELIHOOD THAT RESPONDENTS WERE PREJUDICED BY THE PROSECUTOR'S ALLEGEDLY IMPROPER REMARKS

If the Court agrees that it was error to refuse to apply the harmless error doctrine to the prosecutor's allegedly improper comments, it may wish to remand the case to the court of appeals with instructions to determine whether the error was harmless. In view, however, of the ambiguity of the remarks given their factual backdrop, and the overwhelming evidence of respondents' guilt, we believe that it is clear that there is no reasonable likelihood that the convictions were influenced by the prosecutor's remarks, and thus that even the stringent standard for evaluating harmlessness of constitutional errors is satisfied here. Accordingly, we submit that further protraction of this litigation by remanding the case for such an assessment by the court of appeals is unnecessary.[18]

In the first place, it is highly unlikely that the jury construed the prosecutor's argument as a com-

[18] It may however be necessary for the court of appeals to consider on remand other assignments of error urged by respondents that it failed to consider on the ground that they were unlikely to recur at retrial (81-6373 Cross-Pet. App. A-6).

ment upon the respondents' failure to testify. See, *e.g.*, *United States* v. *Palacios*, 612 F.2d 972, 973 (5th Cir. 1980). When placed in its proper context, the most reasonable interpretation of the procecutor's argument was the interpretation accepted by the district court (J.A. 24): *i.e.*, that the respondents' theory of defense was inadequate because it failed to deal with the overwhelming evidence linking respondents to the rapes, and instead attempted to divert the jury's attention from that evidence by focusing upon the victims' activities earlier in the evening.[19] The

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[19] Thus, although the prosecutor referred to the "defendants" (rather than the "defense"), he apparently did not intend to comment on respondents' own silence (A. 23-24; Tr. 972). As the court of appeals noted (Pet. App. 4a), and as we have previously discussed (pages 18-19, *supra*), reference to the failure of the defense to rebut the government's evidence is improper only when the statement is intended to be or will naturally and necessarily be construed by the jury to be an allusion to the defendant's failure to testify. See, *e.g.*, *United States* v. *Caicedo-Asprilla*, *supra*, 632 F.2d at 1170; *United States* v. *Jenkins*, 544 F.2d 180 (4th Cir. 1976), cert. denied, 431 U.S. 931 (1977); *United States* v. *Bartemio*, 547 F.2d 341, 346 (7th Cir. 1974). In any event, the posture of the evidence was such that respondents were *not* the only persons who could have rebutted the victims' testimony. For example, respondents might have called alibi witnesses, or have attempted to establish through either the owner of the garage or respondent Stewart's mother that the victims' version of events was unreliable. Indeed, two defense attorneys made just such use of Mrs. Stewart's testimony in their closing arguments (Tr. 886, 937). Moreover, respondents were able to challenge the victims' testimony regarding their participation in the rapes in other ways. In particular, they argued that, shortly before the incident, the victims had consumed alcoholic beverages and that their perceptions were therefore distorted; that some of the victims were unable to identify them with certitude during lineups shortly after the assaults; and that, because their physical appearances at the

objectionable statements were prefaced by an invitation to "look at the evidence the defendants put on here for you so that we can put that in perspective." When the defense objected to this opening remark, the prosecutor responded that if the defense "put[s] on a case, the Government can comment on it" (J.A. 21). And, following the remarks in question, he summarized his purpose in making them by stating that the defense "want[s] you to focus your attention on all of the events that were before all of the crucial events of that evening" and exhorted the jury to "look at the evidence as a whole, as it has been presented" (*ibid.*).

Given this contextual framework, it is not surprising that, in denying respondents' mistrial motion, the trial judge construed the prosecutor's remarks merely, as "commenting on what evidence had been presented" (J.A. 24). Indeed, when viewed in its totality, nothing in the prosecutor's argument reasonably could be construed as a comment upon respondents' failure personally to testify or as a suggestion that their exercise of the Fifth Amendment privilege against testifying supported an inference of guilt. See, *e.g.*, *United States* v. *Sigal*, 572 F.2d 1320, 1323 (9th Cir. 1978). In short, contrary to the conclusion of the court of appeals, the comments at worst crossed the line of impropriety by a whisker.

There was, moreover, overwhelming evidence of respondents' guilt. All three of the victims, who had ample opportunity to observe their assailants at close range over an extended period of time, positively

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time of the rapes did not coincide with the descriptions given by the victims, they could not have been the assailants. Respondents' counsel could, of course, properly point out in their closing arguments that the prosecutor's argument failed to take account of this defense evidence.

identified each of the respondents (Tr. 115-121; 296-304; 407-412).[20] Personal property and articles of clothing belonging to the victims were discovered in Stewart's apartment (Tr. 636-638). The turquoise Cadillac in which the victims had been driven to St. Louis was registered to Williams, and his fingerprints were found in the automobile from which the victims had been abducted (Tr. 684, 672-673). Stewart's mother confirmed that during the early morning of October 11, 1979, Stewart and Williams had taken two white women from the Cadillac and led them to Stewart's room (Tr. 608-610), and the owner of the garage where the girls had been taken following their abduction testified that he observed four black males, one of whom matched Anderson's description, raping a girl there (Tr. 586-589). Finally, photographic and testimonial evidence established that the victims had been assaulted and had not consented to any of the sexual activity (*e.g.*, Tr. 627-631). Under the circumstances it is not surprising that the court of appeals acknowledged that there was "clear evidence of guilt" (Pet. App. 5a). In view of the strength of the government's case, it is virtually impossible that the prosecutor's remarks, which were apparently a commentary upon the respondents' trial tactics rather than upon their failure to testify, could have contributed in any way to the jury's verdict.

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[20] Newcomb also identified all the respondents except Gibson (Tr. 509-513). In addition, one or more of the victims had identified each respondent in pretrial lineups (Pet. App. 2a).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Petitioner*,

v.

KELVIN HASTING, et al., *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED*

Whether, in light of the government's deliberate comment on respondents' failure to testify at trial despite the court of appeals' repeated admonitions that such comments were improper, the court of appeals correctly refused to apply the *Chapman* v. *California* doctrine of harmless error.

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* Respondents Gable Gibson, Gregory Williams, Napoleon Stewart, and Kevin Anderson are not named in the case caption.

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CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const., Amend. V. provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself.

18 U.S.C. § 3481 provides:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

STATEMENT OF THE CASE

Prior to the alleged abduction, the three women drank beer and/or other alcoholic beverages (T. 170-71, 204-06, 209, 278, 353-56, 463-64, 538-39). The car which they occupied belonged to Marianne Long's boyfriend and was used by Long (T. 190). Long stated that although she allowed Starnes to drive the car following their departure from the steak house, Long's drinking had not affected her ability to drive (T. 123). However, Randy Newcomb allegedly told Illinois State Police trooper Thomas Beathy that Starnes drove the car because Long had drunk too much liquor that evening (T. 743).

The women indicated that prior to the abduction they purchased oil at a Clark station (T. 176, 281). They further stated that upon arriving at the station they observed a green Cadillac, the car which allegedly contained respondents (T. 111, 176, 282, 364). The women testified that they did not talk to the men in the car. However, Kenneth Dowell, the Clark station attendant, testified that because of the late hour the women were unable to purchase any oil (T. 751-52). Dowell also observed talking between the occupants of the two cars at the gas station (T. 755). The court refused to allow questioning regarding prior sales of marijuana at the station (T. 814).

According to the women, immediately prior to the abduction respondents' car forced the women's car off the road. The testimony varies regarding the details of this incident. Warren indicated that she felt a bump (T. 107). Long stated that the assailants' car struck the rear end of the women's car (T. 181). Starnes, who drove the women's car, stated that the assailants' car approached her vehicle along the driver's side and forced it off the road (T. 283). Randy Newcomb, who was also present in the women's vehicle, stated that he did not remember the car being struck (T. 551), and trooper Beathy testified that he did not observe any damage to the left side of the women's vehicle (T. 746).

Starnes testified that once her car was allegedly forced off the road she attempted to shift the car into reverse and quickly exit, but her attempted maneuver was unsuccessful (T. 283). However, Newcomb told trooper Beathy that Starnes turned off the car at the scene (T. 743).

The women testified respecting rapes and sodomies that occurred at the scene of the alleged abduction. Newcomb was also present at the scene and during direct examination identified all respondents except Gibson. While Newcomb stated that a rape had occurred, he did not identify the alleged assailant (T. 515). Respondents allegedly made Newcomb undress and turn his back to the activities for most of this period (T. 515-16).

The alleged abduction occurred in East St. Louis, Illinois. It was still dark at the time (T. 109-14). While the women testified that there was adequate artificial light at the scene, Newcomb stated that the area was dark and that the only lighting came from the dome light inside of Long's car (T. 517, 527, 551). He also stated that the headlight on Long's car was not illuminated (T. 551).

The women were transported from the scene in a car allegedly owned by one of the respondents. Their heads were forced down by respondents so they could not see (T. 222, 304, 310, 418). Respondents Stewart and Williams were allegedly sea-

ted in the front seat with Long, and respondents Hasting, Gibson and Anderson occupied the back seat with Starnes and Warren (T. 124, 307, 418). According to Long, the men in the front were arguing over the ultimate destination, but she could not understand the conversation (T. 123, 125-26).

Newcomb did not accompany the women, and he was released at the scene of the abduction (T. 516). He did not immediately report the incident to the police, but instead hitch-hiked home (T. 517). When a passing motorist offered to drive Newcomb to the police station, he refused to go (T. 746). When contacted by police regarding the alleged incident, Newcomb initially refused to immediately appear at the station, and he appeared only after the Caseyville police threatened to bring him into the station (T. 731-34).

The women were allegedly taken to a dark garage located in St. Louis, Missouri (T. 128). Long stated that as many as eight or nine men were in the garage, and she could not identify them because her eyes were covered most of the time (T. 224-25). According to Long and Starnes, they were subsequently taken to an apartment of one of the respondents. Long stated that the stairway leading to the room was "pitch black," and she could not tell much about the room (T. 135).

Anna Stewart testified for the government that she observed respondents Stewart and Williams exit the Cadillac with two white women. Mrs. Stewart did not identify the women (T. 610), and the government did not ask her to identify them at trial. Mrs. Stewart did not testify regarding any coercion, and she stated that the one woman whom she saw for a somewhat greater length did not look frightened (T. 620). Mrs. Stewart stated that the woman did not make any attempt to talk to her (T. 620).

Warren was not taken to the apartment, but was allegedly taken to a second garage. Warren stated that there were more than six men in this garage (T. 422). Warren did not testify regarding the lighting in the garage.

The government offered testimony from garage owner Robert Washington that he observed four black men raping a woman in the garage, and that one of the men wore a wide-brimmed hat (T. 586-89). The women testified that respondent Anderson wore such a hat (T. 116-17, 303-04). However, Washington testified on cross-examination that he knew Anderson very well but he was unable to identify either Anderson or any other assailant (T. 587, 594-95).

The women identified respondents at trial. Long testified that she would have noticed any visible scars on respondent Stewart's face but did not see any markings (T. 188-89). At trial, Stewart exhibited visible scars on his face (T. 722-24). They also indicated that Anderson had a bushy, Afro-style haircut at the time of the occurrence (T. 116-17, 412). However, Anderson offered evidence that in the early evening on October 10, 1979, and as late as 6:00 a.m. on October 11, 1979, Anderson's hair was set in tightly-weaved "french braids" (T. 786-805). Moreover, both Long and Warren failed to identify Anderson in the lineup conducted at the St. Louis Police station following the alleged occurrence (T. 770). The women also testified that respondents Williams and Hasting wore a goatee and mustache, respectively, (T. 114-15, 262) but defense witnesses denied this testimony (T. 749, 809).

The government also introduced testimony that respondent Williams' fingerprint was found on the car driven by the women. The car was left at the scene of the alleged abduction in East St. Louis, Illinois, prior to any interstate transportation (T. 124). The government's witness conceded on cross-examination that it is impossible to determine either the time or location that the fingerprint was left on the car (T. 666).

The government did not offer any fingerprint identification respecting the green Cadillac in which the women and respondents were allegedly transported. In addition, Mrs. Stewart testified that the government exhibit depicting the green Cadillac did not look like respondent Williams' car (T. 617).

The case was team-tried by two federal prosecutors. Responsibilities were divided throughout the trial. The final argument was conducted the day after all evidence had been introduced and the conference on instruction had been essentially completed (T. 849-56). The objectionable comments were offered as part of the government's first portion of closing argument. None of the defense attorneys had argued his case prior to the prosecutor (T. 855-56), and with minor exception defense counsel did not interrupt the government's argument prior to the contested remarks (T. 856-73). When the district court overruled the defendants' objection to government argument regarding "what the defendant[s] did not do" (J.A. 21), the government indicated four items of evidence that were not "challenged" by respondents—the rapes and sodomies, the kidnapping, the interstate transportation, and respondents' whereabouts (J.A. 21). The prosecutor did not indicate that his remarks were inadvertently made (J.A. 23-24).

Following the reversal of respondents' convictions, the govenment filed a petition for rehearing. In the petition, the government admitted that respondents were the only witnesses who could have challenged the women's testimony regarding the sexual attacks, kidnapping, and transportation (Pet. for Reh. 3). The government's petition was denied by the court of appeals without comment.

SUMMARY OF ARGUMENT

I.

The court of appeals correctly refused to apply the doctrine of harmless error enunciated in *Chapman* v. *California* to this case. While *Chapman* protects the integrity of a conviction from innocuous constitutional and statutory violations, it is widely recognized that *Chapman* neither contemplated nor authorized repeated and deliberate violations of fifth amendment rights not to testify. The government is not automatically entitled to the application of *Chapman* under such circumstances. The court of appeals has repeatedly held, as improper, government comments that evidence is unchallenged or unre-

futed by non-testifying defendants, and it has warned the government that such comments should not occur. With full knowledge of those decisions, the government has again improperly commented on the failure to testify. Thus, the decision to reverse the convictions here is warranted in order to correct the abuse.

Although the court did not expressly invoke it, the court clearly possessed supervisory power to fashion its order. Courts of appeals sitting in direct review may exercise such power to properly administer criminal justice within the federal court system. Supervisory power traditionally has been recognized and invoked by this Court and courts of appeals both to deter misconduct which violates constitutional and congressionally-established rights and to protect the integrity of the judicial system itself. Since supervisory power is invoked to promote the overall administration of justice, the court need not identify prejudice in an individual case. Given the government's persistent and deliberate indifference to the court's warnings directed precisely at the comments offered at trial, the exercise of supervisory power was particularly appropriate.

The harmless error rules codified under 28 U.S.C. § 2111, Fed.R.Crim. P. 52(a), and Fed.R.Civ.P. 61 do not prevent the invocation of supervisory power. Courts have recognized that the power may be utilized even if government misconduct does not violate constitutional due process standards, and it logically follows that the power may be appropriately exercised even though the conduct might not be proscribed by a statute or federal rule. Moreover, legislative history plainly establishes that the harmless error codifications are inapplicable to constitutional and statutory violations. Furthermore, application of the rules to cases of intentional misconduct would distort their purpose. Harmless error rules should be invoked by reviewing courts to protect a judgment. They may not be used by prosecutors to obtain a judgment through the introduction of unconstitutional or unlawful comment. The rules should operate to restrain prosecutors from repeated misconduct and

not to tacitly authorize such misconduct where the prosecutor determines that a conviction is safe from reversal.

The court opted for the only reasonably available course of action. Its many prior warnings were ignored, demonstrating that repeated warnings were ineffective. Prosecutors are absolutely immune from civil actions, and the possibility that the government would institute criminal actions against its prosecutors is remote. The use of a court's contempt power would be inappropriate, and local court rules would not alleviate the problem, particularly because the district courts have not followed the court's warnings. The administration of self-discipline, although possible, provides a weak alternative. Thus far, the Executive Branch has not yet disciplined prosecutors for improper comments, and the government's brief in this case demonstrates that the Executive Branch does not view such comments as a serious problem. Under the separation of powers doctrine, courts lack power to review the imposition of discipline, if discipline is administered at all. The Executive Branch can ignore the whole problem of improper comments at its will. The court's only effective power lies in its ability to reverse a conviction for deliberate, repeated prosecutorial misconduct.

The decision does not repudiate or modify the *Chapman* doctrine. It does not create a blanket rule preventing the future application of *Chapman* to prosecutorial errors. The court properly acted to correct a persistent problem within the Seventh Circuit. The decision will deter prosecutors who, unlike policemen, should appreciate constitutional law and will feel the sting and burden of reversals. The decision will promote public confidence in the administration of justice, and ultimately reduce the possibility of reversal. Although witnesses may be compelled to re-testify, that is not a valid reason to condone intentional misconduct. The decision will not burden the government, and it can avoid any adverse impact from the decision by recognizing the rights of accused persons at trial.

II.

The comment that respondents failed to challenge certain crucial portions of the government's case was not harmless beyond a reasonable doubt. The issue of whether any error occurred is not included in the question presented for review. Moreover, the comment was improper because it effectively indicated that respondents bear the burden of introducing evidence to "challenge" the government's case. The comment was manifestly intended to be or was such that the jury naturally and necessarily viewed it as a comment on respondents' failure to testify. Only respondents could have "challenged" the government's evidence regarding the sexual attacks, kidnapping, interstate transportation and respondents'whereabouts. As the court of appeals found, equivocal interpretation was impossible.

Under the circumstances, the error was highly prejudicial. The comment unfairly bolstered the credibility of the government's witnesses, whose credibility was clearly in issue, and consequently tainted the evidence respecting the allegedly unchallenged sexual attacks, kidnappings, and interstate transportation, as well as respondents' whereabouts. Since the only evidence regarding respondents' participation in federal crimes came from the alleged victims, there is a reasonable likelihood that the error infected the verdict. Any remaining untainted evidence was insufficient to convict, thus supporting the conclusion that prejudice existed.

Assuming this Court does not wish to determine whether respondents were prejudiced by the comments, it should remand the case to the court of appeals to resolve this issue and any remaining unresolved questions.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY REVERSED RESPONDENTS' CONVICTIONS WITHOUT RESORT TO THE DOCTRINE OF HARMLESS ERROR IN ORDER TO CORRECT THE GOVERNMENT'S VIOLATION OF THE CONSTITUTIONAL AND STATUTORY RIGHTS OF RESPONDENTS AND TO DETER SIMILAR MISCONDUCT.

A.

The Court Of Appeals Responded To Repeated And Longstanding Prosecutorial Abuses Of The Right To Refrain From Testifying At Trial.

While *Chapman* v. *California*, 386 U.S. 18 (1967) is undoubtedly important, it does not resolve this case. It merely provides the starting point.

In *Chapman*, the prosecutor commented during closing argument on defendant's failure to testify, and the trial court instructed the jury that it could draw unfavorable inferences from that failure. Based on *Griffin* v. *California*, 380 U.S. 609 (1965), this Court had no difficulty in finding a fifth amendment violation, but it rejected a rule of automatic reversal for all constitutional errors. The Court opted for a rule under which certain constitutional errors, including comments on the failure to testify, could be deemed harmless. *Id.* at 22-23. The Court held that where a reasonable possibility exists that a constitutional error committed during closing argument contributed to the conviction, reversal must follow. If the error was harmless beyond a reasonable doubt, the conviction may stand. *Id.*at 23-24.

Although *Chapman* permitted a harmless error analysis for fifth amendment violations, it did not contemplate an avalanche of prosecutorial misstatements. Concurring in the decision, Justice Stewart would have adopted a rule of automatic reversal, noting that "[p]rosecutors are unlikely to indulge in clear violations of Griffin in the future. . . ." *Id.* at 45. The dissent would have allowed the states to develop their own

harmless error rules until shown that the states were using their rules "to destroy or dilute constitutional guarantees." *Id.* at 50 (Harlan, J. dissenting). The dissent further reasoned that a harmless error analysis is inappropriate in cases involving intentional prosecutorial misconduct—an issue not before the Court in *Chapman* only because the trial pre-dated *Griffin*. *Id.* at 52 n. 7, 55 n. 9.

The potential for abuse of the *Chapman* doctrine has been widely recognized. The *Chapman* Court itself noted that ". . . harmless-error rules can work very unfair and mischievous results. . . ." *Id.* at 22. Appellate courts have been cognizant of prosecutors' increasingly misplaced reliance on the doctrine following the commission of constitutional error. See *United States* v. *Sanders*, 547 F.2d 1037, 1042 (8th Cir. 1976) *cert. denied*, 431 U.S. 956 (1977); *United States* v. *Rodriguez*, 627 F.2d 110, 113 (7th Cir. 1980); *United States* v. *Jackson*, 429 F.2d 1368, 1372 (7th Cir. 1970); *United States* v. *Hammond*, 598 F.2d 1008, 1013-14 (5th Cir. 1979). As the Court stated in *United States* v. *Stewart*, 576 F.2d 50, 56 (5th Cir. 1978):

> We cannot, as the government urges, allow the Chapman harmless error rule to be a Monday-morning-quarterbacking appellate vehicle that justifies ignoring the plainest requirements of established constitutional and procedural principles as though they did not exist.

Commentators have warned that the automatic application of the harmless error rule by the courts could result in deliberate government misconduct in future cases. *E.g.*, Mause, *Harmless Constitutional Error: The Implications of Chapman* v. *California*, 53 Minn. L. Rev. 519, 552-54 (1969); Note, *Principles for Application of the Harmless Error Standard*, 41 U. Chi. L. Rev. 616, 626 (1974); Note, *Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814 (1970). In fact, at least one commentator has urged that harmless error rules should never be applied to cases of intentional constitutional misconduct by the government. Field, *Assessing The Harmlessness of Federal Constitutional Error—A Process in Need Of A Rationale*, 125 U. Pa. L. Rev. 15, 29 n. 56 (1976).

This case comes to the Court in a much different posture than *Chapman*, and it surely presents a different issue. At the time *Chapman* was tried, a state prosecutor's comment on the failure to testify was not yet considered improper. In contrast, the Seventh Circuit had ruled on several occasions prior to this trial that the type of comment made here by the federal prosecutor was highly improper. Nonetheless, the government now claims it has an absolute right to the automatic application of the *Chapman* doctrine, even where conduct found by the court of appeals on numerous prior occasions to constitute error was intentionally repeated. The Seventh Circuit disagreed. At issue in this case is the power of federal courts to refrain from applying *Chapman* in an appropriate case in order to effectively deter repeated and deliberate violations by federal prosecutors of the constitutional and statutory rights of the accused. Clearly, *Chapman* should not be applied here, and in fact, its application would condone its further abuse by prosecutors.[1]

The government has isolated the decision below from troubling history of Seventh Circuit decisions regarding prosecutorial comments on the failure to testify. It is precisely the court's

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[1] In the two post-*Chapman* cases decided by this Court involving prosecutorial comment on defendants' fifth amendment rights, the state court trials antedated the *Griffin* decision. *Wilson* v. *Anderson*, 379 F.2d 330, 331 (9th Cir. 1967) *rev'd sub. nom. Anderson* v. *Nelson*, 390 U.S. 523 (1968); *Fontaine* v. *California*, 390 U.S. 593, 594 (1968). In fact, none of the Supreme Court decisions cited by the government involved repeated misconduct. In *Lockett* v. *Ohio*, 438 U.S. 586 (1978), this Court found that no error occurred in the first place. Similarly, the appellate decisions cited by the government (Br. 13) do not concern repeated constitutional misconduct. The closest case is *United States* v. *Sanders*, 547 F.2d 1037 (8th Cir. 1976), *cert. denied*, 431 U.S. 956 (1977), where the court warned that continued reference by prosecutors to allegedly "uncontradicted" testimony where defendants did not take the stand is "increasingly likely to offend the conscience of the court." *Id.* at 1043.

disturbing experiences which prompted the corrective action taken here.

Long before *Griffin*, this Court ruled that direct or indirect comments by federal prosecutors on an accused's failure to testify violated federal law. *Wilson* v. *United States*, 149 U.S. 60, 66-67 (1893).[2] Even prior to *Griffin*, the Seventh Circuit cautioned that comments by federal prosecutors that evidence was "undenied" or "unrefuted" by a non-testifying defendant were improper when only defendant could refute the evidence. *United States* v. *Wright*, 309 F.2d 735, 738-39 (7th Cir. 1962) *cert. denied*, 327 U.S. 929 (1963). Nonetheless, the problem continued to surface. *United States* v. *Poole*, 379 F.2d 645 (7th Cir. 1967); *United States* v. *Lyon*, 397 F.2d 505 (7th Cir.) *cert. denied*, 393 U.S. 846 (1968). The court also warned that comments suggesting that evidence was "uncontradicted" by cross-examination could be highly prejudicial, and it stated that prosecutors took an unnecessary risk that the trial might be rendered unfair. *United States* v. *Handman*, 447 F.2d 853, 855-56 (7th Cir. 1971). However, the prosecutors still refused to heed the court's admonitions. *United States* v. *Fearns*, 501 F.2d 486 (7th Cir. 1974).

The court was again forced to deal with the problem in *United States* v. *Buege*, 578 F.2d 187 (7th Cir.) *cert. denied*, 439 U.S. 871 (1978). Noting that "what we said on a previous

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[2] In *Wilson*, the prosecutor violated the statute now known as 18 U.S.C. § 3481, presently providing:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

The statute was enacted to protect fifth amendment guarantees. *Stewart* v. *United States*, 366 U.S. 1, 2 (1961). The government violated this statute here.

occasion has not been taken seriously," the court held that a comment that evidence was "uncontradicted" constituted error. *Id.* at 189-90. Although the court found the error harmless under *Chapman*, it warned the government that it would consider following the lead of the First Circuit and issuing summary reversals if the problem did not abate. *Id.* Later that year, while finding that a particular comment was either not directed to the failure to testify or was harmless error, the court again advised prosecutors that comments on the failure to testify, "even those of the most indirect nature, are highly disfavored." *United States* v. *Muscarella*, 585 F.2d 242, 249 (7th Cir. 1978).

In February, 1979, the court decided *United States* v. *Moody*, No. 78-1981 (7th Cir. Feb. 27, 1979), and once again cautioned prosecutors that even subtle references to the failure to testify by use of terms such as "uncontradicted" or "unrefuted" were improper (see attached supplement).[3] The court noted that the use of such terms was unnecessary and that the administration of justice would best be served by avoiding arguable as well as blatantly improper comments. 627 F.2d 110, 112. The court stated that continued disregard by prosecutors would demonstrate that warnings were ineffective, thereby requiring summary reversals. *Id.* To ensure actual notice to the federal prosecutors, the Chief Judge ordered the decision to be circulated to all United States Attorneys in the circuit with instructions to either disseminate copies to assistant United States attorneys or circulate an explanatory memorandum. *Id.*[4] Significantly, the decisions in

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[3] While under Local Rule 35 an unpublished order is not to be cited, the Seventh Circuit itself discussed the *Moody* decision in *United States* v. *Rodriguez*, 627 F.2d 110 (7th Cir. 1980).

[4] Under the circumstances, the assistants were bound to know about *Moody* because knowledge of the U.S. Attorney is imputed to and among assistants. *Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *United States* v. *Ott*, 489 F.2d 872, 873-74 (7th Cir. 1973). The

(footnote continued on next page)

Buege and *Moody* were rendered prior to this trial. Since these decisions were not reversed or overruled, the government was obliged to obey them. *Ithaca College Faculty Association* v. *NLRB*, 623 F.2d 224, 228-29 (2d Cir.) *cert. denied*, 449 U.S. 975 (1980).

The court's bad experiences with the problem continued even after *Moody*. In *United States* v. *Rodriguez*, 627 F.2d 110 (7th Cir. 1980), the court stated that "[a] federal prosecutor in final argument has done it again." *Id.* at 110. The court's frustration was painfully obvious:

> We view the issue from a slightly different perspective than does a trial judge. The problem is not new. It continues to arise with disturbing frequency throughout this circuit despite the admonition of trial judges and this court. Usually it has been caused by subtle prosecutorial comments, e.g., that certain evidence is "uncontradicted." Even subtle references to the fact that defendant has not testified have been condemned.

Id. at 112. The court recognized that:

> A defendant's liberty should not so often depend upon our struggle with the particular circumstances of a case to determine from a cold record whether or not the prosecutor's remarks were harmless. The remarks, harmless or not, infringing upon such a basic and elementary constitutional underpining of our justice system, simply should not occur.

Id. at 113. The court voiced its growing "sense of futility [with] the persistent disregard of prior admonitions," and while continuing to follow the *Chapman* rule, it again threatened the issuance of summary reversals. *Id.* at 112.

With its patience finally exhausted, the Seventh Circuit took much-needed action in this case. It found that the prosecutor's

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failure to communicate information among prosecuting attorneys, even in a large office, is inexcusable. *Santobello* v. *New York*, 404 U.S. 257, 260, 262 (1971).

comments, made in the initial portion of closing argument with respect to conduct allegedly involving only the victims and respondents, were unmistakably directed to respondents' silence:

> It is difficult to imagine a more pointed allusion to the failure of the defendants to take the witness stand other than a direct reference to such failure. Equivocal interpretation is not possible.

(Pet. 4a). Noting many of its previous decisions, the court refused to apply the harmless error doctrine to compromise respondents' constitutional rights.

Thus, Seventh Circuit history reveals a pattern of constitutional violations, reliance on the *Chapman* doctrine, and ineffective warnings. Justice Clark's remarks regarding the federal prosecutor's similarly persistent disregard of the dictates of *Miranda* v. *Arizona* seem equally apropos here:

> "Harmless error" is swarming around the 7th Circuit like bees. Before someone is stung, it is suggested that the prosecutors enforce *Miranda* to the letter and that the police obey it with like diligence; otherwise the courts may have to act to correct a presently alarming situation.

United States v. *Jackson*, 429 F.2d 1368, 1373 (7th Cir. 1970) (Clark, J. sitting by designation).

The decision below represents the Seventh Circuit's considered attempt to correct this serious and chronic problem, and it is clearly authorized by law.

B.

The Decision Below Was Authorized Under The Court's Supervisory Power Over The Administration Of Criminal Justice In The Federal Courts.

28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause

> and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Courts may exercise their supervisory power under this section to serve the ends of justice. *United States* v. *Munsingwear*, 340 U.S. 36, 38 (1950); *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233, 241 n. 17, 242 (1957); *United States* v. *De Coster*, 624 F.2d 196, 207 (D.C. Cir. 1979).[5] Although the Seventh Circuit did not expressly invoke its supervisory power, this case would clearly warrant its exercise.[6]

It is well established that federal appellate courts possess supervisory power to establish and maintain civilized standards for the proper administration of criminal justice within the federal judicial system. *NcNabb* v. *United States*, 318 U.S. 332, 340 (1943); *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124 (1956); *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973). The power may be invoked even though particular conduct does not violate minimum constitutional standards of due process. *McNabb* at 340; *Cupp* at 146.

While supervisory power is often utilized to exclude unfairly gathered evidence, *United States* v. *Payner*, 447 U.S. 727 (1980), it also may be employed to prevent prosecutorial misconduct at trial. In *Donnelly* v. *De Christoforo*, 416 U.S. 637 (1974), the Court reversed the granting of *habeas corpus* relief, but it acknowledged:

> We do not, by this decision, in any way condone prosecutorial misconduct, and we believe that trial courts, by

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[5] The origins of supervisory power are discussed in Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 Geo. L. J. 1050 (1965).

[6] That the court did not explicitly invoke its supervisory power is irrelevant. *Blum* v. *Bacon*, ____ U.S. ____, 72 L. Ed 2d 728, 733 n. 5 (1982).

> admonition and instruction, and appellate courts, by proper exercise of their supervisory power, will continue to discourage it.

Id. at 648 n. 23.

Supervisory power has traditionally served a two-fold purpose. Courts have exercised the power to deter misconduct which frustrates rather than promotes the demands of the law inherent in the administration of justice. For example, in *McNabb* v. *United States*, 318 U.S. 332 (1943), petitioner's conviction was based on a confession obtained in violation of a federal statute requiring prompt arraignment. In reversing the conviction, the Court stated:

> A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application.
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> The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers.
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> * * *
>
> Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.

Id. at 344, 345; accord, *United States* v. *Payner*, 447 U.S. 727, 735 n. 8 (1980).

In this regard, when compliance with the law has been repeatedly ignored, the use of supervisory power is most appropriate. In *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), district judges continually ignored the Seventh Circuit's directive to refrain from referring antitrust matters to a master. Noting that "there is an end of patience and it clearly appears that the Court of Appeals has for years admonished" the district judges of the circuit against such practices, the Court ruled that the court of appeals, in the exercise of its

supervisory power, properly reviewed a referral order by way of *mandamus*. *Id.* at 258, 259-60.

More recently, in *United States* v. *Morrison*, 449 U.S. 361 (1981), this Court implicitly recognized the power of courts to correct recurrent abuses. In reversing a dismissal of an indictment for sixth amendment violations occurring subsequent to indictment, the Court found that the dismissal was an inappropriate means to deter a deliberate violation. However, the Court added:

> . . . we note that the record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter further lawlessness.

Id. at 366 n. 2.

Supervisory power is also exercised to maintain the integrity of the judicial process. As the *McNabb* Court stated:

> They [law enforcement officials] subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding.
>
> * * *
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> Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.

318 U.S. at 342, 345; *Mesarosh* v. *United States*, 352 U.S. 1, 9, 14 (1956); *United States* v. *Payner*, 447 U.S. 727, 735 n. 8 (1980).

Significantly, because supervisory power is implemented to further the overall administration of justice, prejudice to the individual need not be demonstrated. In *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), persons who worked for daily

wages were excluded from the jury considering petitioner's claim. Petitioner moved to set aside the verdict for respondent because of the jury composition. In denying the motion, the district court found that nearly half the jury was expected to be sympathetic to plaintiff. *Id.* at 220. However, this Court, in the exercise of its supervisory power, reversed the judgment:

> That conclusion [regarding the exclusion of potential jurors] requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. See *McNabb* v. *United States*, 318 U.S. 332, 340. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class.

Id. at 225.

Thus, the maintenance of " 'proper standards for the enforcement of the federal criminal law in the federal courts,' *McNabb* v. *United States*, 318 U.S. 332, 341 [is] an obligation that goes beyond the conviction of the particular defendant before the court." *Sherman* v. *United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J. concurring). This principle has guided the appellate courts:

> Ordinarily, appellate courts may exercise their general supervisory power in cases *in which they have jurisdiction* in order to establish a general rule prohibiting governmental conduct, otherwise likely to be repeated, despite a lack of prejudice or without a showing of prejudice in the particular case. Courts have occasionally used their supervisory power to prevent the government from benefiting from misconduct in order to protect the integrity of the judicial system despite the lack of a constitutional or statutory rule protecting the defendant from the conduct.

United States v. *Martinez*, 667 F.2d 886, 891 (10th Cir. 1981) (emphasis in original); Note, *The Supervisory Power Of the*

Federal Courts, 76 Harv. L. Rev. 1656, 1657 (1963). Accordingly, a showing of prejudice is unnecessary.[7]

Courts of appeals have consistently recognized and applied their supervisory power to promote the administration of justice. Most notable is *United States* v. *Flannery*, 451 F.2d 880 (1st Cir. 1971). There the court reversed a conviction because the prosecutor argued during closing argument that certain evidence was "uncontradicted" by the non-testifying defendant. *Id.* at 881. Finding that federal prosecutors had persistently ignored previous warnings, the court, through its supervisory power, fashioned a prospective rule requiring automatic reversal for such comments. The court carved an exception for cases in which the trial judge immediately interrupted the trial and both advised the jury of defendant's right to silence and stated that the prosecutor was guilty of misconduct. *Id.* at 882. Prior to the decision below, the Seventh Circuit had threatened to adopt the *Flannery* rule. *United States* v. *Buege*, 578 F.2d 187, 189-90 (7th Cir.) *cert. denied*, 439 U.S. 871 (1978); *United States* v. *Moody*, No. 78-1981 (7th Cir. Feb. 27, 1979); and *United States* v. *Rodriguez*, 627 F.2d 110, 112-13 (7th Cir. 1980).

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[7] Critically, two lines of case law must be distinguished. First, since federal courts do not possess supervisory authority over state courts, *Smith* v. *Phillips*, ___ U.S. ___, 71 L.Ed. 2d 78, 89 (1982); *Cupp* v. *Naughten*, 414 U.S. 141 (1973), cases arising from state courts which require a showing of prejudice are inapposite. Second, policy considerations differentiate appellate standards between cases directly reviewed through the federal system and cases collaterally reviewed through either habeas corpus or other post-sentencing review procedures. *United States* v. *Frady*, ___ U.S. ___, 71 L.Ed.2d 816, 828, 829-30 (1982); *Stone* v. *Powell*, 428 U.S. 465, 491 n. 31 (1976); *United States* v. *De Coster*, 624 F.2d 196, 207 (D.C. Cir. 1979). Cases in the latter group are likewise inapplicable. These distinctions necessarily limit the use of federal supervisory power to federal cases arising on direct appellate review.

The government's contention that post-*Flannery* convictions have not been reversed in the absence of prejudice is inaccurate. Actually, the First Circuit has found either that the comments were not directed to the failure to testify or that any error was sufficiently cured by the trial judge.[8] Thus, the *Flannery* approach has proven highly successful.

Other courts of appeals have exercised their supervisory power. In *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972), the court dismissed an indictment because the government continually used hearsay evidence before the grand jury without advising it that better evidence existed. The court had previously condemned, without effect, the "casual attitude" of the prosecutors in presenting such evidence, and it exercised its supervisory power[9] in the hopes of deterring further abuse:

> We had hoped that, with the clear warnings we have given to prosecutors, (citations omitted) and the assurances given by United States Attorneys, (citation omitted) a reversal for improper use of hearsay before the grand jury would not be required. Here the Assistant United States Attorney, whether wittingly or unwittingly—we prefer to think the latter, clearly violated the [applicable standard]. We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may

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[8] *United States* v. *Flaherty*, 668 F.2d 566 (1st Cir. 1981); *United States* v. *Saverese*, 649 F.2d 83 (1st Cir. 1981); *United States* v. *Canas*, 595 F.2d 73 (1st Cir. 1979); *United States* v. *Goldman*, 563 F.2d 501 (1st Cir. 1977); *Lussier* v. *Gunter*, 552 F.2d 385 (1st Cir. 1977); *United States* v. *Hooker*, 541 F.2d 300 (1st Cir. 1976); *United States* v. *Farnkoff*, 535 F.2d 661 (1st Cir. 1976); *United States* v. *Kubitsky*, 469 F.2d 1253 (1st Cir. 1972); *United States* v. *McDonald*, 455 F.2d 1259 (1st Cir. 1972); *United States* v. *Medina*, 455 F.2d 209 (1st Cir. 1971). Notably, in *Flaherty*, the court re-affirmed the *Flannery* rule. 668 F.2d 566, 592-93.

[9] See *United States* v. *Jacobs*, 547 F.2d 772, 778 (2d Cir. 1976) *cert. dismissed*, 436 U.S. 31 (1978).

> help to translate the assurances of the United States Attorneys into consistent performance by their assistants.

Id. at 1137.

In *United States* v. *Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert. dismissed*, 436 U.S. 31 (1978), following the Supreme Court's vacation of an earlier opinion [429 U.S. 909 (1976)], the Second Circuit explained that pursuant to its supervisory power, it had imposed a one-time sanction in order to conform the conduct of the federal Strike Force with the conduct of U.S. Attorneys in the same district regarding the giving of warnings to potential grand jury targets. *Id.* at 773.

In *United States* v. *Stewart*, 576 F.2d 50 (5th Cir. 1978), the government obtained a conviction in violation of *Miranda* and introduced it at trial to demonstrate, *inter alia*, defendant's criminal record even though it was not in issue. Invoking its supervisory power, the court reversed the conviction and specifically refused to apply *Chapman:*

> The prosecutor had to know that the *Miranda* warnings were critically deficient. And yet the Government persisted in offering the confession. We are forced to conclude that despite the Government's awareness of the palpable, nonexcusable violations of *Miranda*, they presumed that this Court would excuse all with an admonition to go and sin no more. This would be the result of our finding harmless error.
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> * * *
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> The errors here were not of the constable on the beat. They were those of the office of the United States Attorney, whose adversary contentions and approach dragged the Trial Judge into flagrant errors. If under these circumstances all can be washed out by a finding of "harmless error," prosecutors will be encouraged to urge that Judges should allow them to take indefensible paths, confident that we will forgive if not forget.

Id. at 56, 57. See also *United States* v. *Florea*, 541 F.2d 568 (6th Cir. 1976) *cert. denied*, 430 U.S. 995 (1977); *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir, 1967).

Other courts have recognized that supervisory power may be utilized to reverse convictions if misconduct is deliberate or recurring. *United States* v. *Axtman*, 589 F.2d 196, 199 n. 7 (5th Cir. 1979); *Ford* v. *United States*, 352 F.2d 927, 933 (D.C. Cir. 1965). In noting that misconduct during closing argument provided one of the most frequent contentions on appeal, the District of Columbia Circuit stated, " 'It may be that the day is near when reversal instead of admonition may become a necessary prophylactic tool to insure that prosecutorial arguments hew to the law.' " *United States* v. *Freeman*, 514 F.2d 1314, 1321 (D.C. Cir. 1975) (without specific discussion of supervisory power).

An exercise of supervisory power was clearly warranted in this case. Under both the fifth amendment and 18 U.S.C. § 3481, federal prosecutors are prohibited from even indirectly commenting on an accused's failure to testify at trial. By its repeated comments, the government has plainly disregarded this fundamental policy. Moreover, by its comment that evidence is not "challenged," the government created the erroneous impression that defendant must go forward with evidence once the government has put on its case. Thus, the comments created confusion as to both the burden of proof and the unrebuttable presumption of innocence. *United States* v. *Flannery*, 451 F.2d 880, 881 n. 1 (1st Cir. 1971).

That the government's misconduct was intentional simply cannot be denied. The government's case was team-tried by two attorneys. Responsibilities were divided throughout the trial in order to ease the burdens of preparation. The closing argument did not begin until the day after all evidence had been offered and the instruction conference had been nearly completed. At the very least the prosecutor had an entire evening in which to prepare his remarks and deliberate over his choice of words. The improper remarks came during the initial portion of the government's closing arguments, and the prosecutor was the first attorney to address the jury. Prior to respondents' objection to the argument in question, the prosecutor's speech was essentially uninterrupted, so he was not

goaded into his remarks by respondents' counsel. The prosecutor's words were precisely chosen, and his statements to the jury were emphatic. When the district court overruled respondents' objection, the prosecutor re-emphasized what respondents "did not do" by stating four times that respondents did not "challenge" the government's evidence of rapes, kidnappings, interstate transportation, and respondents' whereabouts. (J.A. 21). The prosecutor made no attempt to withdraw the statements.

One other factor must be considered. The prosecutor directly disregarded of the Seventh Circuit's repeated admonitions to the government. As previously detailed, the court warned government lawyers that the type of comment made at trial was absolutely improper. Given all these objective circumstances, see *Oregon* v. *Kennedy*, ___ U.S. ___, 72 L.Ed.2d 416, 424 (1982), the government's continuing misconduct must be considered deliberate. See *United States* v. *Ott*, 489 F.2d 872 (7th Cir. 1973).[10]

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[10] Although not apparently resting on supervisory powers, in *Ott* the court reversed a conviction because a prosecutor deliberately stated facts to the district court which other prosecutors knew were false. The court noted that 1) the comments were made by a U.S. Attorney; 2) the comments were unequivocal; 3) the comments were used by both parties to seek relief; and 4) the government continued the charade by not advising the appellate court of the true facts. *Id.* at 875.

With slight modification, the *Ott* analysis is appropriate here. The remarks were made by an assistant U.S. Attorney and were unequivocal. As the court of appeals held, "Equivocal interpretation is not possible" (Pet. App. 4a). Moreover, the remarks were offered as part of the government's final argument to sway the jury. See *Bram* v. *United States*, 168 U.S. 532, 541 (1897). Finally, although the government had ample time to reflect on the Seventh Circuit's many warnings against the use of such improper argument, it refused to heed those decisions.

This case clearly supported the exercise of supervisory power. The government's persistent disregard of the constitutional and statutory rights of the accused at trial frustrated the proper administration of criminal justice. Moreover, its deliberate misconduct put the Seventh Circuit's own integrity on the line. To prevent its becoming a wilful accomplice to lawlessness by the government, the court could exercise its power to deter further misconduct.

Nothing cited by the government would prevent the exercise of supervisory power here. This case does not concern the power either to establish rules of evidence or production of documents or to enunciate principles of witness competency—activities traditionally left to Congress. *Palermo* v. *United States*, 360 U.S. 343 (1959); *Wolfle* v. *United States*, 291 U.S. 7 (1934); *Funk* v. *United States*, 290 U.S. 371 (1933).

Moreover, supervisory power may be employed notwithstanding the existence of a statute which arguably permits the conduct. As *McNabb* recognized, the power is appropriately used even though the proscribed conduct does not violate minimum standards of due process. 318 U.S. 332, 340; *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973). It logically follows that the power may be appropriately exercised even though conduct might not be proscribed by a statute. In this regard, *Hampton* v. *United States*, 425 U.S. 484 (1976) is instructive. In a plurality opinion, the Court ruled that "the statutory defense of entrapment" was inapplicable because petitioner was predisposed to commit a crime. *Id.* at 488, 489-90.[11] However, five justices indicated that if government misconduct was sufficiently egregious, a court could exercise its supervisory power to reverse a conviction regardless of the individual's predisposition. (Powell and Blackmun, J.J. concurring at 493-

[11] The reference to the "statutory" defense was apparently derived from *Sorrells* v. *United States*, 287 U.S. 435 (1932).

94, 495 n. 6; Brennan, Stewart and Marshall, J.J. dissenting at 497, 499, 500 n. 4); accord *United States* v. *Hammond*, 598 F.2d 1008, 1015 n. 6 (5th Cir. 1979).

More specifically, 28 U.S.C. § 2111, Fed. R. Crim. P. 52(a), and Fed. R. Civ. P. 61 are inapplicable. While *Chapman* notes that § 2111 does not "on its face [distinguish] between federal constitutional errors and errors of state law or federal statutes and rules," *Chapman* did not rely on the harmless error statute. 386 U.S. 18, 22. In holding that federal law governs the application of harmless federal error rules, the Court stated:

> We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which *in the absence of appropriate congressional action*, it is our responsibility to protect by fashioning the necessary rule.

Id. at 21 (emphasis supplied). Moreover, the Court relied on the standard articulated in *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), a decision which did not consider the federal statute.

Constitutional and statutory violations simply do not fit within § 2111. In *Bruno* v. *United States*, 308 U.S. 287 (1939), defendant refused to testify pursuant to the predecessor of 18 U.S.C. § 3481. *Id.* at 292 n. 1. The district court refused to instruct the jury that defendant's silence could not be used against him. On appeal, the government urged that under 28 U.S.C. § 391, the predecessor to § 2111, the error was harmless. In rejecting the applicability of the harmless error statute, the Court stated:

> Suffice it to indicate, what every student of the history behind the Act of February 26, 1919 [the harmless error statute], knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him.

Id. at 294; cf. *Kotteakos* v. *United States*, 328 U.S. 750, 764-65 (1946); see also *Carter* v. *Kentucky*, 450 U.S. 288, 300 (1981). Obviously, if violations of congressional dictates were not within the statutory coverage, violations of Constitutional mandates would likewise be excluded.[12]

Fed. R. Crim. P. 52(a) and Fed. R. Civ. P. 61 are also inapposite. Those provisions were merely designed to apply existing law, i.e., 28 U.S.C. § 391, to the district courts. *Kotteakos* v. *United States*, 328 U.S. 750, 757 n. 9 (1946). Thus, the rules did not apply to constitutional and statutory violations.

Assuming *arguendo* that harmless error codifications could be applied, the government's continued reliance on these provisions goes to the very heart of the problem here. The harmless error rule, whether created by statute, federal rule or case law, functions in the first instance as a principle of judicial review which shields the integrity of judgments from the innocuous mistakes of trial participants. By their repeated misconduct, federal prosecutors in the Seventh Circuit have changed the rule into a principle of trial strategy, under which blatant constitutional and statutory violations are injected into cases deemed safe from reversal. The shield has been turned into a sword, contrary to the purpose of the harmless error rule. *Fahy* v. *Connecticut*, 375 U.S. 85, 94 (1963) (Harlan, J. dissenting); see also *United States* v. *Payner*, 447 U.S. 727, 738 (Marshall, J. dissenting).

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[12] The legislative intent has never been modified. Section 391 was originally numbered § 269 as part of the Judicial Act of 1919. 40 Stat. 1181. By the Act of January 31, 1928, § 269 was retitled 28 U.S.C. § 391. See 45 Stat. 54. The statute was repealed in 1948 because of the promulgation of Fed. R. Civ. P. 61 and Fed. R. Cr. P. 52(a). However, it was re-enacted the following year as 28 U.S.C. § 2111 in order to reincorporate the provision of § 269 for the benefit of reviewing courts. H.R. Rep. No. 352, 81st Cong., 1st Sess. 18 (1949). Thus, the design of the legislation remained unchanged.

As the government asserts, "the harmless error rule is not simply a principle of judicial restraint" (Br.15). The rule also states a principle of prosecutorial restraint. It instructs government prosecutors in a non-threatening manner that certain conduct is improper so that they will not repeat the error. However, to the chagrin of the Seventh Circuit, prosecutors have persistently disregarded its teachings. Because the prosecutors believe that the harmless error rule must be automatically applied in all situations, the rule has not effectively served its educational and coercive function.

Clearly, the allowance of continued government misconduct under the guise of harmless error rules will eventually erode the purpose of the rule itself. Moreover, it will whittle away the trial rights of an accused. Appellate courts which cannot deter repeated misconduct because of the mandatory application of harmless error rules will simply despair of even making an attempt.

This is not a case for the automatic application of harmless error rules. Indeed, the mere use of the word "error" is inappropriate. The prosecutor deliberately commented on the failure to testify in order to buttress his case before the jury. "There has been no blunder" at all. *United States* v. *Payner*, 447 U.S. 727, 746 (Marshall, J. dissenting). The supervisory power of the court of appeals was clearly available to prevent this continued abuse of the judicial system.

C.

There Is No Effective Alternative To The Action Taken By The Court Of Appeals.

Contrary to the government's suggestion, reversal of respondents' convictions was the only viable remedy.[13]

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[13] See *Wolf* v. *Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J. dissenting):

(footnote continued on next page)

Undoubtedly, additional warnings should not be required. If this case demonstrates anything, it demonstrates that a court which can do nothing but issue warnings will be unsuccessful in deterring misconduct. The actions of prosecutors plainly reveal their willingness to accept criticism from the Seventh Circuit in exchange for convictions, no matter how obtained. The court would be remiss in its own responsibilities if it merely issued another warning. See *United States* v. *Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972).

Legal recourse against prosecutors is unavailable. Federal prosecutors are absolutely immune from civil actions for damages resulting from misconduct at trial. *Butz* v. *Economou*, 438 U.S. 478, 509-10 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409, 422 (1976). While criminal actions are authorized under 18 U.S.C. § 241 and 242, the likelihood that such an action would be instituted is almost nil. Respondents have not found a single case in which a criminal action was brought against a federal prosecutor, and given the tenor of the government's brief (Br. 18-19), criminal prosecution is very unlikely here. "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates" for the constitutional and statutory violations committed here. *Wolf* v. *Colorado*, 338 U.S. 25, 42 (1949) (Murphy, J. dissenting); *Mapp* v. *Ohio*, 367 U.S. 643, 670 (1961) (Douglas, J. concurring).

The court's contempt power would not reach this type of misconduct. The prosecutor did not commit contemptuous conduct in the Seventh Circuit and, therefore, the court of appeals could not impose such a sanction. *United States* v. *Seale*, 461 F.2d 345, 366-67 (7th Cir. 1972). Moreover, since the miscon-

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Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all.

duct did not prevent the district court from exercising its judicial functions, the district court could not hold the prosecutor in contempt. See *In re McConnell*, 370 U.S. 230, 236 (1962). Further, contempt would be inappropriate because court of appeals decisions did not enjoin the prosecutor's misconduct, and the prosecutors technically remain free to repeatedly comment on the failure to testify. The court's previous decisions simply indicated that continued misconduct would result in reversals.

The imposition of discipline through local court rules will not rectify the problem. The prosecutor has not broken any rules in the Seventh Circuit which would make him subject to discipline. Furthermore, these cases are repeatedly reaching the court of appeals because the district courts have not effectively dealt with improper comments. Indeed, the district court here found that the remarks were proper, and it is unlikely that a district court will discipline a prosecutor for conduct which the court finds acceptable.

Self-discipline may be a commendable approach, but it is an ineffective alternative. Of course, that option has always been available, but the government has not seriously invoked it.

The imposition of penalties against an individual does not solve the problem of repeated misconduct. Assuming the government agrees that any error occurred here (Br. 22-23), it obviously considers the problem minor (Br. 17-18).[14] Presumably, only an official reprimand would issue. U.S. Dep't. of Justice, DOJ Order 1725.1A, *Discipline and Adverse Actions*, ch. 2 & App. 1 (April 27, 1981). Yet, if every prosecutor in the Seventh Circuit committed the same supposedly minor infraction just once, the court of appeals still would be deluged with cases on just this issue alone. The problem with

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[14] Clearly, the government does not perceive intentional or habitual violations by the prosecutor in violation of ABA Model Code of Professional Responsibility DR7-106(c)(1980), thus making it unlikely that disciplinary proceedings will be instituted under 28 C.F.R. 45.735-1(b), (c) (1981).

the government's approach is that it does not get the message through to the prosecutorial system that the violation of fifth amendment and statutory trial rights constitutes a very serious problem.

Additionally, the courts cannot be assured of effective self-discipline. The United States Attorney and his assistants are members of the Executive Branch. *Newman* v. *United States*, 382 F.2d. 479, 481, 482 (D.C. Cir. 1967). Under the doctrine of separation of powers, the Executive Branch wields the exclusive power to discharge or discipline a prosecutor. *Id.* at 482; *United States* v. *Payner*, 447 U.S. 727, 737 (1980) (Burger, C.J. concurring). The courts of appeals are powerless to enforce stricter disciplinary action, or for that matter, to compel any action whatsoever within the Executive Branch. It could readily change its disciplinary procedures, and the courts would be left without a guaranty that self-discipline would be continuously exercised. Unless the court possesses the power to impose the sanction of reversal, the government will lose any incentive for self-discipline. *United States* v. *Caceres*, 440 U.S. 741, 767-68 (1979) (Marshall, J. dissenting).

The alternatives of continued warnings, civil or criminal prosecution, contempt, and administrative discipline are either non-existent or inadequate. See *Franks* v. *Delaware*, 438 U.S. 154, 169 (1978). The court of appeals utilized the only effective alternative at its disposal. Without the power to reverse and remand, the court can do nothing at all to prevent further misconduct.

D.
As A Proper Exercise Of Its Authority To Control Local Matters, The Decision Will Further The Administration Of Criminal Justice In The Seventh Circuit.

Although the government suggests that the court has created a blanket rule of automatic reversal in this type of case (Br. 17, 18), the decision does not support that interpretation.[15]

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[15] The government contends that the difficulty in evaluating comments which possibly concern the failure to testify makes a blanket

(footnote continued on next page)

The court did not reject the *Chapman* doctrine. Prior to the decision, it had consistently applied *Chapman* to comments on the failure to testify. Interestingly, each judge on the panel in this case had participated in a decision applying *Chapman* to similar fifth amendment claims. *United States* v. *Buege*, 578 F.2d 187 (7th Cir.) *cert. denied*, 439 U.S. 871 (1978); *United States* v. *Muscarella*, 585 F.2d. 242 (7th Cir. 1978); *United States* v. *Moody*, No. 78-1981 (7th Cir. Feb. 27, 1979); *United States* v. *Rodriguez*, 627 F.2d. 110 (7th Cir. 1980). Moreover, the decision is not as harsh as the court had previously threatened. While the court had several times announced that it would adopt the First Circuit's rule in *United States* v. *Flannery*, 451 F.2d 880 (1971), to counteract repeated violations, it did not adopt that rule.

Thus, the court did not retreat from *Chapman*. The Seventh Circuit did not even rule that *Chapman* is always inapplicable to intentional and repeated misconduct. The scope of its decision is very narrow. Through its decision, the court merely indicated that it could properly refuse to apply *Chapman* in an appropriate case, especially when the automatic application would only condone continued fifth amendment and statutory

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rule inadvisable. In the government's cases, either no error was found, *Lockett* v. *Ohio*, 438 U.S. 586 (1978); *United States* v. *Sanders*, 547 F.2d 1037 (5th Cir. 1976) *cert. denied*, 431 U.S. 956 (1977); *United States* v. *Caicedo-Asprilla*, 632 F.2d 1161 (5th Cir. 1980); *Frank* v. *Blackburn*, 605 F.2d 910 (5th Cir. 1979) *aff'd en banc*, 646 F.2d 873 (1980); *United States* v. *Hephner*, 410 F.2d 930 (7th Cir. 1969), or the comment was inadvertent at worst. *United States* v. *Chandler*, 586 F.2d 593 (5th Cir. 1978); *United States* v. *McDonald*, 455 F.2d 1259 (1st Cir.) *cert. denied*, 406 U.S. 962 (1972); *United States* v. *Samuels*, 398 F.2d 964 (5th Cir. 1968). In this case, the prosecutor did not comment on a defense theory, nor respond to antecedent remarks of defense counsel. Moreover, he was not guilty of a mere slip of the tongue which he immediately corrected. The prosecutor deliberately and unequivocally commented on respondents' failure to testify.

violations. More than likely, the court imposed a one-time sanction to deter future misconduct. See *United States* v. *Jacobs*, 547 F.2d 772, 773 (2d Cir. 1976) *cert. dismissed*, 436 U.S. 31 (1978); *United States* v. *Morrison*, 449 U.S. 361, 366 n.2 (1981). If prosecutors demonstrate a renewed appreciation of defendant's fifth amendment rights, nothing in the decision will prevent the application of *Chapman*.

The decision does not affect other circuits. It offers a local response to a local problem. Clearly, a court of appeals possesses supervisory power to control activities of courts and attorneys within its circuit. See *Ehrlichman* v. *Sirica*, 419 U.S. 1310, 1311 (1974) (per Burger, C.J.); *Smith* v. *Katzenbach*, 351 F.2d 810, 816 (D.C. Cir. 1965). The Seventh Circuit can best feel the pulse of misconduct within its circuit and can best measure the amount of deterrent force needed to correct a circuit-wide problem. Thus, intra-circuit affairs should be left to the court of appeals. See *In re McConnell*, 370 U.S. 230, 237 (1962) (Harlan, J. dissenting).

The decision furthers the proper administration of justice by eliminating extraneous issues and deterring future misconduct. The decision will not prohibit the introduction of reliable and probative evidence or argument. See *United States* v. *Payner*, 447 U.S. 727 (1980). No reliable or probative inferences may be drawn from an accused's failure to testify at trial. *Wilson* v. *United States*, 149 U.S. 60, 66 (1893); see also *Fletcher* v. *Weir*, — U.S. —, 71 L.Ed.2d 490, 493 (1982).

Additionally, the decision will deter prosecutorial misbehavior. In recent years, the deterrent effect of exclusionary rules on police misconduct has been questioned. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 n. 5 (1974); *Stone* v. *Powell*, 428 U.S. 465, 492 n. 32 (1976). However, police and prosecutors occupy very different positions. Often police do not understand or appreciate fast-changing constitutional nuances. Prosecutors thrive on them. As the Fifth Circuit stated:

> We do not review here the untutored policeman in hot pursuit who commits an error of constitutional law. This is

> *the* Government, through its sophisticated, supposedly informed legal representatives, deliberately imposing on the Trial Judge a position not necessary to the Government's case and for which . . . no legitimate basis existed.

United States v. *Stewart*, 576 F.2d 50, 56 (5th Cir. 1978) (emphasis in original). The argument is even more compelling here because this is not an area of the law which has troubled the Seventh Circuit. The court has very clearly indicated that the comment made here is absolutely improper.

The sanction imposed is well suited to the problem. Exclusionary rules have been additionally criticized because the burden of acquittal or reveral does not fall on policemen, whose involvement with a case is generally limited to making arrests and seizing evidence. However, prosecutors look for convictions, and they will bear the weight of reversal resulting from improper trial conduct. *United States* v. *Freeman*, 514 F.2d 1314, 1321 n. 45 (D.C. Cir. 1975). Thus, the remedy is tailored to the situation at hand.

The decision does not give respondents a free ticket back to the streets. Unlike the situations presented in *United States* v. *Morrison*, 449 U.S. 361 (1981) and *United States* v. *Blue*, 384 U.S. 251 (1966), the court did not dismiss respondents' indictments. Under the decision, respondents must be re-tried and if found guilty, they will surely be re-sentenced. The court merely sought to provide a trial free of blatant and deliberate constitutional and statutory violations.

The Seventh Circuit is not looking for ways to reverse convictions. It has taken a tough position on defense contentions that prosecutorial comments made during closing arguments warrant new trials. See, *e.g.*, *United States* v. *West*, 670 F.2d 675, 689-90 (7th Cir. 1982); *United States* v. *Cook*, 432 F.2d 1093 (7th Cir. 1970). Subsequent to the rendition of the decision below, the court has applied the harmless error rules in an appropriate situation. *United States* v. *Lewis*, 671 F.2d 1025 (7th Cir. 1982). By its decision here, the court has merely refused to become a party to repeated constitutional violations and inproper reliances on *Chapman*.

The government's argument that public confidence in the administration of justice may be shaken is purely speculative. If conjecture is permissible, then one must also speculate that the public will be appalled at continuing deliberate constitutional violations. The fifth amendment protects not only the allegedly guilty but also the innocent, *Wilson* v. *United States*, 149 U.S. 60, 66 (1893), and the law-abiding public may be disturbed to learn that its rights can be so easily ravaged in the rush to jail the guilty. Moreover, society's interest in obtaining a guilty verdict should not be weighed in the balance with a court's attempts to deter intentional government misconduct. See *Oregon* v. *Kennedy* ___ U.S. ___, 72 L. Ed. 2d 416, 431 (1982) (Stevens, J. concurring).

The heinous nature of the crimes is irrelevant. *United States* v. *Rubin*, 559 F.2d 975, 985 (5th Cir. 1977) *vacated and remanded*, 439 U.S. 810 (1978) *on remand*, 591 F.2d 278 (5th Cir.) *cert. denied*, 444 U.S. 864 (1979). It is too late to consider the traumatic impact of retrial. The court gave the government prosecutors more than ample warning, yet the prosecutor flagrantly disregarded the admonitions. The government should have considered the trauma of retrial prior to making the deliberate comments.

The decision imposes no new burden of proof on the government, nor does it prevent necessary and inventive argument.[16] Prosecutors will not suffer "chill" (Br. 19), because direct or indirect comments on the failure testify have been consistently prohibited. The government can easily avoid any adverse im-

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[16] Indeed, courts have found prosecutorial misconduct of various types particularly offensive because it is generally unnecessary to obtain a conviction. *United States* v. *Freeman*, 514 F.2d 1314, 1321 (D.C. Cir. 1975); *United States* v. *Jackson*, 429 F.2d 1368, 1373 (7th Cir. 1970); *United States* v. *Stewart*, 576 F.2d 50, 55-56 (5th Cir. 1978); *United States* v. *Springer*, 460 F.2d 1344, 1355 (7th Cir.) (Stevens, J. dissenting) *cert. denied*, 409 U.S. 873 (1972).

pact from the decision by refraining from such plain misconduct.

In so doing, the government will eliminate a large source of challenges which come before the appellate courts. See *United States* v. *Freeman*, 514 F.2d 1314, 1321 (D.C. Cir. 1975). It will reduce the workload of the courts and diminish the chance of reversal. In this sense, the decision may provide greater benefit to the government than to defendants. *United States* v. *Jacobs*, 547 F.2d 772, 778 (2d Cir. 1976) *cert. dismissed*, 436 U.S. 31 (1978).

In the ultimate sense, the decision will benefit the overall administration of justice:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."

Brady v. *Maryland*, 373 U.S. 83, 87 (1963).

The decision promotes the proper administration of criminal justice, and it should be affirmed.

II.

THE COMMENT ON RESPONDENTS' FAILURE TO TESTIFY CONSTITUTED PREJUDICIAL ERROR.

A.

The Government's Claim That No Error Occurred Has Been Waived And, In Any Event, Is Without Merit.

Supreme Court Rules 21.1(a) an 34.1(a) limit argument to those issues presented in the petition for certiorari and every fairly included subsidiary question. See *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972); *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958). The question presented by the petition does not challenge the propriety of the court's finding of error:

> Whether the court of appeals correctly refused to apply the harmless error doctrine when it concluded that the prosecutor had commented on respondents' failure to testify.

It merely assumes error occurred, and it challenges the Seventh Circuit's failure to apply the harmless error doctrine.

Any doubt about this interpretation is quickly dispelled by a cursory review of the question presented in the government's brief on the merits:

> Whether closing argument by the prosecutor that constitutes improper comment upon the defendants' failure to testify justifies reversal of their convictions even though the error is harmless.

Thus, the issue of the existence of error is not directly presented. Furthermore, it is not a fairly included subsidiary question. Under normal analysis, a court must first determine whether error occurred and subsequently consider whether the error was prejudicial or harmless. The question here eliminates the first part of the analysis. While a question regarding the prejudicial or harmless nature of an error may be subsidiary to the question regarding whether an error was committed, the converse is not true.

In any event, the comment here constituted error. The mere reference to the alleged failure to challenge evidence fundamentally misstates the law. Under the American system, the government must establish its case beyond a reasonable doubt, and an accused may be lawfully acquitted even though he did not offer any evidence at trial. The accused has no responsibility to challenge the government's evidence. Rather, the government bears the burden of rebutting an accused's plea of not guilty. By this plea, a defendant puts into issue all matters not affirmatively conceded, thereby controverting the government's case from the very start. *United States* v. *Flannery*, 451 F.2d 880, 881 n. 1 (1st Cir. 1971); *United States* v. *England*, 347 F.2d 425, 431 (7th Cir. 1965).

> The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot

> be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: "Prove it!"

Williams v. *Florida*, 399 U.S. 78, 112 (1970) (Black, J. dissenting). By commenting on the failure to "challenge", the government distorts the burden of proof by intimating that an accused must go forward with evidence to affirmatively rebut the government's case.

As the court of appeals held, the government's statement constituted an unequivocal reference to respondents' failure to testify. A prosecutor's indirect comment will violate *Griffin* v. *California* if the remark was manifestly intended to be or was of such character that the jury would naturally and necessarily consider the remark as a comment on an accused's failure to testify. *United States* v. *Buege*, 578 F.2d 187 (7th Cir.) *cert. denied*, 439 U.S. 871 (1978); *United States* v. *Savarese*, 649 F.2d 83 (1st Cir. 1981); *United States* v. *Caicedo-Asprilla*, 632 F.2d 1161 (5th Cir. 1980) *cert. denied*, 450 U.S. 1000 (1981).

After generally noting that defendants "did not do" certain things at trial, the prosecutor specifically stated:

> The defendants at no time ever challenged any of the rapes whether or not that occurred, any of the sodomies. They didn't challenge the kidnapping, the fact that the girls were in East St. Louis and they were taken across to St. Louis. They never challenged the transportation of the victims from East St. Louis, Illinois to St. Louis, Missouri, and they never challenged the location or whereabouts of the defendants at all the relevant times.

(J.A. 21). In cases involving sexual assault, the accused is generally the only person who can dispute the victim's testimony. See *Neil* v. *Biggers*, 409 U.S. 188, 200-01 (1972); *Runnels* v. *Hess*, 653 F.2d 1359, 1362, 1363 (10th Cir. 1981). In this case, Newcomb was the only witness other than the victims who identified any of the respondents at the scene of the

alleged abduction. He allegedly saw one act of intercourse, but he was unable to indicate the alleged assailant. For much of the period, he was forced to keep his back to the scene (T. 516). Moreover, Newcomb's involvement occurred prior to the interstate transportation of the women (T. 516).

Anna Stewart saw two respondents with two white women, but she did not identify the women at trial, nor did she witness any sexual acts (T. 610). Robert Washington allegedly witnessed a rape, but testified that he could not identify the assailants (T. 595). Furthermore, the only persons who could have challenged the interstate transportation were respondents. The women testified that they were alone with respondents during the transportation (T. 124, 306, 418). It is not surprising, therefore, that in its Petition for Rehearing before the Seventh Circuit, the government admitted that respondents were the only persons who could challenge the women's testimony regarding the sexual attacks, kidnapping, and interstate transportation (Pet. for Reh. 3). [17]

The remark regarding respondent's failure to challenge evidence regarding their whereabouts was also improper. If a defendant was required to account for his own whereabouts at all relevant times, he would surely be forced to take the stand.

The government's suggestion that respondents could have presented alibi witnesses or offered various kinds of evidence and argument is unavailing. As is often true, respondents did not enjoy the luxury of alibi witnesses, and the government certainly has not identified such witnesses. The government's argument illustrates the basic problem with its approach. The government must base a conviction on evidence presented in court, and not on actions which respondents failed to take at trial. Through the comment, the prosecutor steered the jury's

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[17] A copy of the Petition for Rehearing has been lodged in the office of the clerk of this Court.

attention away from the affirmative cases of both the government and respondents and toward the non-testifying respondents.

The court of appeals found that the prosecutor so clearly commented on respondents' failure to testify that "[e]quivocal interpretation is not possible" (Pet. App. 4a). That conclusion is unassailable.

B.

The Government's Comment Was Prejudicial.

The rules for determining the prejudicial impact of error are plainly defined. Error may not be deemed harmless simply because overwhelming evidence supports the conviction. *Chapman* v. *California*, 386 U.S. 18, 23 (1967); *Harrington* v. *California*, 395 U.S. 250, 254 (1969). Instead, a court must determine whether a reasonable possibility exists that the error contributed to the conviction. *Chapman* at 18; *Harrington* at 254-55.

Of course, the credibility of witnesses plays a crucial role in any criminal trial. An accused person who refuses to offer an affirmative defense may be acquitted simply because the jury does not believe the government's case. A fifth amendment violation goes right to the heart of the element of credibility. Although the credibility of a government witness is always in issue, see *Stewart* v. *United States*, 366 U.S. 1, 6 n. 13 (1961), a comment on an accused's failure to testify unfairly bolsters the witness' credibility. It effectively informs the jury that the government's witnesses must be telling the truth or else defendant would have testified to the contrary. See *Grunewald* v. *United States*, 353 U.S. 391, 423-24 (1957); *United States* v. *Rodriguez*, 627 F.2d 110, 114 (7th Cir. 1980) (Larson, J. dissenting). Thus, the government's comments upset the credibility balance in its favor.

Runnels v. *Hess*, 653 F.2d 1359 (10th Cir. 1981), illustrates the prejudicial nature of the comments here. The prosecutor commented that defendant did not rebut testimony of the

prosecutrix that she had been raped. The prosecutor itemized the evidence during closing argument, and he argued that each item was not rebutted. During trial, the government offered several witnesses, but the only witness who testified regarding penetration was the prosecutrix. Furthermore, the defense witness established inconsistencies and contradictions in the prosecutrix's story. Accordingly, the court ruled that the comment was prejudicial.

Certainly, the credibility of the government's witnesses in this case was not beyond reproach. Marianne Long testified that she did not drink too much liquor and that her drinking was not the reason she allowed Starnes to drive her boyfriend's car (T. 123). However, Illinois State Police trooper Thomas Beathy testified that according to Randy Newcomb, Starnes drove the car because Long had drunk too much liquor (T. 743).

The women testified that upon entering the Clark station, they purchased oil (T. 176, 281). They stated that a green Cadillac was also at the station, but the women did not talk to the occupants of that car (T. 111, 176, 282, 364). However, the gas station attendant testified that because of the late hour, no oil was sold to the women (T. 751-52). Furthermore, he observed talking between the occupants of the two cars (T. 755). One respondent attempted to introduce evidence regarding the sale of marijuana at the station, but the court sustained the government's objection (T. 814).

The women testified that just prior to the alleged abduction, respondents' car forced the women's car off the road. Warren stated that she felt a bump from the assailant's car (T. 407). Long stated that the car was jostled at the rear end (T. 181), and Starnes, the driver, testified that respondents' car approached along the driver's side of her car and forced it to the right (T. 283). However, Newcomb stated that he did not remember the car being jolted at all (T. 551). Moreover, trooper Beathy testified that he did not observe any damage to the left side of the women's vehicle (T. 746).

Starnes stated that once her car was allegedly forced off the road, she attempted to reverse directions and quickly exit the scene (T. 283). However, Newcomb told Beathy that Starnes turned off the car at the scene (T. 743). Although Newcomb was not abducted, he failed to immediately report the incident to the police (T. 519). In fact, when the police called him, Newcomb did not volunteer to appear at the station, and he finally appeared after being told by the police that he would be brought into the station (T. 731-34).

The government's comment tainted four specific areas of the evidence. The government argued that respondents refused to challenge the rapes and sodomies, the kidnapping, the transportation from Missouri to Illinois, and the location of respondents at all relevant times.

Given the nature of the evidence and the questions respecting the witnesses' credibility, the taint was significant. The women themselves mainly testified regarding the rapes and sodomies. Although Newcomb was present when a rape allegedly occurred at the scene of the abduction, he did not identify the assailant (T. 515). Moreover, the events at the scene of the abduction occurred prior to any interstate transportation.

The taint played an especially significant role respecting the interstate transportation of the women. Unless the government proved interstate transportation, a jury could not convict respondents on conspiracy, kidnapping and Mann Act charges. Only the women themselves offered testimony regarding the transportation (T. 516). Without their tainted testimony, there was no evidence upon which to convict, thus greatly raising the likelihood of prejudice. See *Kotteakos* v. *United States*, 328 U.S. 750, 764 n. 18 (1946). Moreover, Long's testimony makes the knowledge of certain respondents respecting the interstate transportation particularly weak. Long testified that she was riding in the front seat with two assailants. The two men were arguing over their ultimate destination, but she could not understand their conversation (T. 123, 124-25). Given her in-

ability to understand, it is unlikely that respondents Hasting, Gibson and Anderson, who were seated in the rear and allegedly occupied with other women, overheard the conversation (T. 124, 307, 418). Yet, by its unconstitutional comment, the government unfairly eliminated any doubt about interstate transportation.

The comment respecting respondents' location was equally prejudicial. It may serve as the classic example of the way an improper remark shifts the burden from the government to the respondents. Given the lack of any alibi witnesses, the comment allowed the jury to readily accept the government's version of the facts.

The government's case was not as strong as the government suggests. Plenty of room existed for debate regarding the alleged identifications of the witnesses. The scene of the alleged abduction was hectic and fast-moving (T. 225-26, 366, 481). The crimes occurred in the darkness of early morning (T. 109-14). While the woman testified that there was adequate artificial light at the initial scene, Newcomb contradicted that testimony. He stated that the area was dark and that the only lighting came from the dome light inside Long's car (T. 517, 527, 551). He also disputed Warren's testimony that the headlights on Long's car were lit (T. 551).

During the alleged transportation, the women were forced to keep their heads down so they could not see their assailants (T. 222, 304, 310).

The three women were allegedly taken to a garage which Long admitted was very dark (T. 128). Long stated that as many as eight or more men were in the garage, all of whom she could not identify because her eyes were covered most of the time (T. 224-25). Long and Starnes were subsequently taken to an apartment of one of the respondents. Long stated that the stairway leading to the room was "pitch black," and she could not tell much about the room (T. 135). Warren was taken to a second garage, but she did not testify about the lighting in the garage. Warren stated that there were more than six men in

the second garage (T. 442), and if the other women are believed, at most only three respondents were present.

These circumstances were not conducive to good identifications. For instance, Long indicated that she would have noticed any visible scars on respondent Stewart's face but that she saw none (T. 188-89). However, at trial, Stewart exhibited the visible scars on his face (T. 722-24). The witnesses testified that Anderson had a bushy, Afro-style haircut (T. 116-17, 412). However, Anderson's witnesses indicated that in the early evening of October 10, 1979, and as late as 6:00 p.m. on October 11, 1979, following the alleged incident, Anderson's hair was set in tightly-weaved "french braids" (T. 786-805). Moreover, Long and Warren failed to identify Anderson in the lineup conducted at the St. Louis Police station (T. 770). While testimony indicated that respondent Williams wore a goatee and Hasting wore a mustache (T. 114-15, 262), defense witnesses denied both assertions (T. 749, 809). Moreover, while the women identified Gibson as a participant at the initial abduction, Newcomb only identified four respondents during direct examination, and Gibson was not included.

The government's other evidence is inconclusive. The presence of one woman's clothes at the apartment does not establish criminal activity. While Anna Stewart testified that two respondents brought two white women into the apartment, Mrs. Stewart did not identify the women (T. 610), and the government did not request an in-court identification. Moreover, Mrs. Stewart did not indicate that the women were forced into the building, and she testified that the one girl she saw for a slightly greater length of time did not appear frightened (T. 620). Mrs. Stewart stated that the woman had the opportunity, but she did not talk to her (T. 620).

Additionally, the testimony of the garage owner Robert Washington is inconclusive. Washington testified that he was unable to identify the men in the dark garage (T. 587, 595). Since Washington knew respondent Anderson very well (T. 594), it is likely that Washington could have identified Anderson if he was present.

The fingerprint of Williams on Long's car does not remotely establish a federal crime. The car was left at the scene in East St. Louis, Illinois, prior to any interstate transportation (T. 124). Moreover, it was impossible to determine either the time or location that the fingerprint was left on the car (T. 666). Similarly, the registration of the Cadillac to Williams is inconclusive. Significantly, while all three women allegedly rode in the car, their fingerprints were not found in it. Moreover, Mrs. Stewart stated that the government's exhibit depicting the car did not look like Williams' car (T. 617). Finally, the pictures of the allegedly battered women are just that and no more. They do not establish who administered the abuse or the time at which beatings were inflicted.

The prejudice was not cured by the general cautionary instruction given at the conclusion of all closing arguments. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 644 (1974); *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (Jackson, J. concurring). This is especially true where, as here, the district court overruled respondents' objections and the government continued its improper comment following the court's ruling. *Wilson* v. *United States*, 149 U.S. 60, 67 (1893).

The government's case is necessarily based on the testimony of the women. Since their testimony was tainted by the government's misconduct, at the very least a reasonable possibility existed that the error affected the result. Accordingly, the decision below is proper even under a harmless error analysis.

C.

This Court May Wish To Remand This Case For A Determination Of The Nature Of The Error.

While the above establishes that the error was prejudicial, if this Court does not feel that such a determination should initially be made in the Supreme Court, it should remand this case to the court of appeals with instructions to determine if the

error was prejudicial.[18] At the same time, the Seventh Circuit may also consider those issues which it initially failed to consider (81-6373 Cross-Pet. App. A-6).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed or, in the alternative, the decision should be vacated and remanded to the court of appeals with instructions to determine whether the comment on respondents' failure to testify was prejudicial and to consider any other issues not previously adjudicated.

Respectfully submitted,

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[18] While the court of appeals stated that the evidence of guilt was clear, *Chapman* and *Harrington* instruct that such cannot be equated with a finding of harmless error. Thus, the Seventh Circuit has not already made the determination.

SUPPLEMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued February 26, 1979
February 27, 1979

No. 78-1981

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PLEAS MOODY
Defendant-Appellant.

UNPUBLISHED ORDER NOT TO
BE
CITED PER CIRCUIT RULE 35

Appeal From The United States District Court For The Northern District Of Illinois, Eastern Division

No. 78-Cr-102

NICHOLAS J. BUA, *Judge.*

Before: HON. THOMAS E. FAIRCHILD, Chief Judge;
HON. ROBERT A. SPRECHER, Circuit Judge;
HON. PHILIP W. TONE, Circuit Judge.

ORDER

The Court, having read the briefs, addressed itself to the record, heard oral argument on behalf of the appellant, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED.

Because the closing arguments to the jury occurred only eight days after our decision in *U.S.* v. *Buege*, 578 F.2d 197 (7th Cir. 1978), we will assume that the Assistant United States

Attorney who tried this case below was unaware of our language in *Buege* which clearly cautions prosecutors about the continued use of arguments such as those used here. On the facts of this case, however, and after a review of the record, we do not believe that the arguments which are the subject of this appeal are such that the jury would "naturally and necessarily" take them to be comments on the defendant's failure to testify. The defendant's conviction will be AFFIRMED.

As also announced from the bench, however, this Court continues to be concerned with the failure of government prosecutors to heed this Court's repeated warnings not to use such term as "undisputed" and "uncontradicted" in argument where the defendant has not testified.

Use of these terms is unnecessary. This is an area where the administration of justice will be served by avoiding arguable as well as actual improper comment.

Continued failure to heed our admonition will demonstrate that admonition is ineffective, and call for summary reversal.

The Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-1463

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

KELVIN HASTING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181 6

28 U.S.C. 2111 ..... 5, 6

Fed. R. Crim. P. 41(c) 3

Fed. R. Crim. P. 52(a) 6

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1463

UNITED STATES OF AMERICA, PETITIONER

v.

KELVIN HASTING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondents' arguments are premised on the assertion that the prosecutor's comment here was an instance of persistent and deliberate flouting of clear limitations on prosecutorial argument (Br. 11-15, 23-25, 27-28, 29, 32 n.15, 35). As we have explained in our opening brief (at 17-19, 22-25), and as the district court recognized, this is simply not an accurate characterization of the applicable limitations or of the particular comment at issue here. At most, the prosecutor erred by stepping slightly over an indistinct line.[1] Accordingly, respondents' arguments about the

[1]Respondents also contend (Br. 36-37) that our discussion regarding the propriety of the prosecutor's comment is beyond the scope of the question presented in our petition. But that discussion is presented only to show the incongruity of a rule that comment on the defendant's failure to testify is *per se* reversible, because of the difficulty at the margin of distinguishing proper from improper comment. We do not ask this Court review the court of appeals' conclusion that the comment at issue here was improper; we ask only that it recognize that this was not such an incontrovertible conclusion as respondents assume.

propriety of imposing prophylactic measures and ignoring the harmless error rule in order to correct flagrant and repeated misconduct are erected upon a nonexistent foundation.[2]

2. Respondents' reliance (Br. 15-28) on the supervisory power as a justification for the court of appeals' disregard of the harmless error rule fundamentally misconceives the nature of that power. The federal court's supervisory power, properly viewed, is not some special judicial creation superimposed on the power to resolve individual cases and controversies, but is merely a somewhat ill-defined component of that power. It is an aspect of the courts' power most frequently mentioned in cases involving matters of judicial administration,[3] but at times invoked to

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[2]We note that other courts of appeals have held that even more pointed comments by prosecutors were not improper. See, *e.g.*, *United States* v. *Stuart-Caballero*, 686 F. 2d 890, 892 (11th Cir. 1982) ("They didn't answer that question to your satisfaction, ladies and gentlemen. They didn't answer it at all"); *United States* v. *DuFriend*, No. 81-1796 (10th Cir. Oct. 14, 1982), slip op. 7 (statement that co-conspirator prosecution witness was "the only one to come here and testify and tell you the story").

[3]See, *e.g.*, *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 599 (1978) (approving district court's discretionary denial of public access to its own records and files); *United States* v. *Hale*, 422 U.S. 171, 180 & n.7, 181 (1975) (reversing conviction for admission of prejudicial and irrelevant evidence); *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion) (requiring jury trial or waiver thereof as precondition to sentence of more than six months in federal criminal contempt proceeding); *Offutt* v. *United States*, 348 U.S. 11, 13 (1954) (ordering retrial of contempt proceeding before different judge); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 225 (1946) (forbidding systematic exclusion of daily wage earners from federal panel); *Mortensen* v. *United States*, 322 U.S. 369, 371-372 (1944) (treating district court transcript as part of appellate record despite failure to file a timely bill of exceptions); *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 676-678 (1944) (restoring judgment of district court where Supreme Court review of court of appeals' reversal was frustrated by dissolution of corporate respondent).

justify the implementation of constitutional or statutory provisions through means not specifically prescribed by the Framers or Congress.[4] In short, if the supervisory power is distinctive in any way, it is so not as a special *kind of power*, but rather as a label that denotes the exercise of judicial power in a certain *kind of case*, i.e., a case in which the matter at issue is an element of judicial procedure not directly regulated by the Constitution, statute, or rule.

Whatever the ultimate source and precise scope of the judicial supervisory power, however, this Court's decisions clearly establish three limitations on its exercise, each applicable to the instant case. First, the supervisory power of the courts is subordinate to the paramount authority of Congress to declare, within constitutional limitations, what practices and procedures will govern the judicial process.[5] As the Court explained in *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959), "Congress has the power to prescribe the rules of procedure for the federal courts, and

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[4] *E.g.*, *McNabb* v. *United States*, 318 U.S. 332 (1943) (suppressing confession obtained after two days of custodial interrogation prior to arraignment, a police practice found to violate a federal statute); *Rea* v. *United States*, 350 U.S. 214, 216-217 (1956) (enjoining federal officer from testifying in state criminal case about evidence obtained from defendant's premises during federal search supported by warrant improperly issued under Fed. R. Crim. P. 41(c)); *Elkins* v. *United States*, 364 U.S. 206, 216 (1960) (in federal criminal trial, suppressing evidence illegally obtained by state officers in search that violated the Fourteenth Amendment).

[5] Respondents rely on Justice Frankfurter's description of the scope of the supervisory power in his concurring opinion in *Sherman* v. *United States*, 356 U.S. 369, 380 (1958). But in addition to the statement quoted by respondents (Br. 19), Justice Frankfurter emphasized in that entrapment case that the formulation of the supervisory standards "does not in any way * * * involve the initiation of a judicial policy disregarding or qualifying that framed by Congress"; he merely recognized "the role of the courts * * * in formulating standards for the administration of criminal justice when Congress itself has not specifically legislated to that end." 356 U.S. at 381.

has from the earliest days exercised that power * * *. The power of this Court to prescribe rules of procedure * * * for the federal courts exists only in the absence of a relevant Act of Congress." Accord, *Gordon* v. *United States*, 344 U.S. 414, 415 (1953); *Wolfle* v. *United States*, 291 U.S. 7, 13 (1934); *Funk* v. *United States*, 290 U.S. 371, 382 (1933).

Second, even if Congress has not prescribed the governing rule, the supervisory power of the court of appeals does not extend to contradicting principles laid down by the Supreme Court. This was precisely the issue in *United States* v. *Payner*, 447 U.S. 727 (1980), which made it clear that inferior courts cannot, on the basis of the supervisory power, adopt prophylactic remedies that are at odds with this Court's own controlling decisions. Such an extension of the supervisory power, this Court held, would enable federal courts to substitute "standardless discretion" for established legal principles governing the relief appropriate for an alleged constitutional violation. 447 U.S. at 733. The court of appeals thus cannot employ its supervisory power to redress Fifth Amendment violations resulting from improper prosecution by holding that they constitute *per se* reversible error, when this Court has squarely held in *Chapman* v. *California*, 386 U.S. 18 (1967), that the constitutional harmless error doctrine applies to such errors. The apparent implication in the opinion below on which respondents rely,[6] that judicial administration within the Seventh Circuit requires abandonment of harmless error analysis in such cases, "amounts to a substitution of individual judgment for the controlling decisions of this Court." *United States* v. *Payner, supra*, 447 U.S. at 737.

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[6]The court actually did not state that its ruling was predicated upon the exercise of any claimed supervisory power. Whether the supervisory power may properly be treated as the implied basis of decision is certainly open to question.

Third, even if no act of Congress or decision of this Court barred recourse to the supervisory power here, its invocation to compel a retrial in this case would constitute clear abuse of any discretion that might be possessed by the court of appeals. This Court has made clear that the supervisory power "must be sparingly exercised [and] where there has been no manifestly improper conduct by federal officials, would be wholly unwarranted." *Lopez* v. *United States*, 373 U.S. 427, 440 (1963) (holding that, absent such a showing, the supervisory power should not be exercised to exclude the introduction of evidence in a federal trial).[7] This is plainly not a case for exercise of supervisory power to reverse convictions for harmless error, for reasons spelled out in our opening brief (at 16-22).

3. Respondents' argument (Br. 26-27) that the federal harmless error statute, 28 U.S.C. 2111, is inapplicable to violations of constitutional or statutory rights (and specifically to comments on defendants' failure to testify), is flatly inconsistent with *Chapman* v. *California, supra*, 386 U.S. at 21-22, where the Court rejected the argument that "all federal constitutional errors * * * must always be deemed harmful" and approved the policy of 28 U.S.C. 2111, which, without "distinguish[ing] between federal constitutional errors and errors of * * * federal statutes and rules," prohibits "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."[8] Indeed, in the wake of *Chapman*,

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[7]Even where the improper conduct was far more egregious than the isolated comment at issue here (see point 1, *supra*), this Court has refused to sanction the use of the supervisory power. *United States* v. *Payner, supra*.

[8]It is not significant, as respondents suggest (Br. 26), that *Chapman* did not find 28 U.S.C. 2111 dispositive. After all, *Chapman* involved a state court judgment, to which the federal statute does not apply. Moreover, the challenge in *Chapman* was a constitutional one, so the statute would not in any event have provided a dispositive answer.

both this Court and the courts of appeals have repeatedly held that the harmless error statute and its counterpart Fed. R. Crim. P. 52(a) apply to violations of procedural rights afforded by the Constitution or by statute, including the guarantee that adverse inferences will not result from a defendant's failure to testify. See, *e.g.*, *Goldberg* v. *United States*, 425 U.S. 94 (1976) (applying harmless error principles to Jencks Act violations); *Coleman* v. *United States*, 420 F. 2d 616, 625 (D.C. Cir. 1969) (applying Section 2111 and Fed. R. Crim. P. 52(a) to comment by counsel on defendants' failure to testify); *United States* v. *Ramseur*, 378 F. 2d 902, 903 (6th Cir. 1967) (applying Fed. R. Crim. P. 52(a) to constitutional objections to procedural errors). Cf. *Kentucky* v. *Whorton*, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting on ground that denial of presumption of innocence instruction violates the Fourteenth Amendment, but suggesting remand for harmless error analysis).

Respondents' reliance (Br. 26-27) on *Bruno* v. *United States*, 308 U.S. 287, 294 (1939), is unavailing. In that case the Court stated that the predecessor of Section 2111 was simply "intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." As *Chapman* demonstrates, however, this description has no continuing validity. Indeed, the version of the harmless error statute to which the remarks in *Bruno* were addressed[9]

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[9]Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181. That Act provided in pertinent part:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

was repealed in 1948 (62 Stat. 862). When the present version of the harmless error statute was enacted in its place, the adjective "technical" was deleted as a modifier of the word "errors." "[T]hese changes indicate a Congressional intention to emphasize the concept that any error not causing detriment should be disregarded." *Brulay* v. *United States*, 383 F. 2d 345, 351 (9th Cir.), cert. denied, 389 U.S. 986 (1967).

4. Respondents contend that the prosecutor's remark was prejudicial because it tended to bolster the victims' credibility (Br. 40-45). But, of course, the court of appeals found that the comment was improper because it implied that defendants' silence could be considered as evidence of their guilt, not because it bolstered the testimony of prosecution witnesses. As respondents point out (Br. 40), the credibility of witnesses is crucial in a criminal trial, so if respondents' argument were correct, comments on a defendant's silence could never be harmless error. As we have shown, that is not the law. Respondents also assert (Br. 38) that the comment was prejudicial because it suggested that respondents had the duty to produce evidence to rebut the prosecution's case. But the court's instructions to the jury emphasized that there was no such duty (Tr. 951, 960). There was thus no possibility that the jury acted on an improper, and unlikely, inference from the prosecutor's remarks. Finally, respondents state (Br. 43) that "[t]he government's case was not as strong as the government suggests"; their principal attack appears to be on the proof of the interstate transportation. But the evidence, including respondent Williams' fingerprint on the victims' car, was clear that the victims were forcibly abducted in one state and later released in another.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11

Docket Sheet

NO. 81-1463-CFY (Vide: 81-6344, 81-6373, 81-6379)	TITLE United States, Petitioner v. Kelvin Hasting, et al.

DOCKETED	COURT
February 3, 1982	United States Court of Appeals for the Seventh Circui

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondents: Paul Victor Esposito, Robert C. Babione, William L. Gagen
January 8, 1982	Application for an extension of time to file petition for writ of certiorari and order granting the same until 2/4/82, by Stevens, J., 1/11/82
February 3, 1982	Petition for writ of certiorari filed. (Record filed).
March 5, 1982	Brief for respondent Gregory Williams in opposition filed.
March 5, 1982	Motion of respondent Kevin Wendell Anderson for leave to proceed in forma pauperis, and brief in opposition file
March 8, 1982	Motion of respondent Gable Gibson for leave to proceed in forma paueris, and brief in opposition filed.
March 11, 1982	Motion of respondent Gregory Lamont Williams for leave to proceed in forma pauperis, and brief in opposition file
March 15, 1982	Motion of respondent Kelvin Hastings for leave to proceed in forma pauperis, and brief in opposition filed.
Apr. 5, 1982	Motion of respondent Napoleon Stewart for leave to proceed in forma pauperis, and brief in opposition filed.
Apr. 28, 1982	DISTRIBUTED. 5-13.
May 17, 1982	The motion of respondent Kevin Wendell Anderson for leav to proceed in forma pauperis is GRANTED. The motion of respondent Gable Gibson for leave to proceed in forma pauperis is GRANTED. The motion of respondent Gregory Lamot Williams for leave to proceed in forma pauperis is GRANTED. The motion of respondent Kelvin Hasting for leave to proceed in forma pauperis is GRANTED. The motion of respondent Napoleon Stewart for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

June 28, 1982	Order extending time to file the joint appendix and petitiner's brief on the merits until July 31, 1982.
July 30, 1982	Order further extending time to file joint appendix and petitioner's brief on the merits until Aug. 4, 1982
Aug. 4, 1982	Brief for petitioner, United States, filed.
Aug. 10, 1982	Joint appendix filed.
Aug. 25, 1982	Order extending time to file respondents' joint brief on the merits until September 30, 1982.
Sept. 30, 1982	Brief for respondents filed.
	(Over)

81-1463

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 13, 1982	CIRCULATED.
Nov. 8, 1982	Motion of respondent Gable D. Gibson for appointment of counsel filed.
Nov. 10, 1982	DISTRIBUTED. 11-24. (Above motion)
Nov. 18, 1982	Reply brief for the United States filed. (D).
Nov. 29, 1982	The motion for appointment of counsel is granted and it is ordered that Paul Victor Esposito, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the respondent Gable D. Gibson in this case.
Dec. 7, 1982	ARGUED.